

Disparate Impact After Ricci and Lewis

Michael K. Grimaldi

Published Article Citation: Michael K. Grimaldi, *Disparate Impact After Ricci and Lewis*, 14 Scholar 165 (2011).

DISPARATE IMPACT AFTER *RICCI* AND *LEWIS*

MICHAEL K. GRIMALDI*

I. Introduction.....	166
II. Explaining the Confusion in <i>Ricci</i> and <i>Lewis</i>	171
A. Legal Background	171
B. <i>Lewis v. City of Chicago</i> : Expanding the Disparate-Impact Statute of Limitations	173
C. <i>Ricci v. DeStefano</i> : Creating the Strong-Basis Standard	175
D. Why <i>Lewis</i> and <i>Ricci</i> Created a Catch-22 in Employment Testing	179
III. Resolving the Employment Testing Conundrum on the Constitutional Level.....	181
A. Scalia's <i>Ricci</i> Concurrence: Provoking the War between Disparate Impact and Equal Protection	183
B. The Constitutional Avoidance Reading Allows Disparate Impact to Survive	185
C. Another Reason to Avoid: The <i>Lewis</i> Court Failed to Raise the Equal Protection Issue.....	193
D. Striking down Disparate Impact Would Cause a Showdown over Congress's Authority Under Section Five of the Fourteenth Amendment	196
IV. Arguments for Keeping the Strong-Basis Standard and Sticking to Constitutional Avoidance Reading	198
A. Arguments for Keeping the Strong-Basis Standard ...	199
i. The Strong-Basis Standard is More Fair than a Good-Cause Standard.....	199

* Discourse Editor, *UCLA Law Review*, Volume 58. J.D., UCLA School of Law, 2011; B.S., University of Southern California, 2008. A special thanks goes to Isomi Miake-Lye for her patience, support, and editing prowess. Additionally, my UCLA faculty advisors, Adam Winkler and Cheryl Harris, provided invaluable assistance throughout the drafting process. Professor Vicki Schultz deserves thanks for teaching me employment discrimination law, as does Professor Noah Zatz for providing helpful guidance. Moreover, this Note would not have been possible without the tremendous help of the UCLA Law Library, especially Cheryl Kelly Fischer and June Kim. Lastly, I thank my family for their unending encouragement and support.

ii.	<i>Ricci</i> Makes Disparate Treatment Easier To Prove and Narrows Disparate Impact	204
iii.	The Strong-Basis Standard Fits into a Theory of Judicial Minimalism	206
iv.	The Strong-Basis Standard Fits Under the Standard Constitutional Borrowing Framework ..	207
B.	Arguments Against the Strong-Basis Standard	208
i.	Lack of Guidance for Lower Courts	208
ii.	The Strong-Basis Standard Will Hinder Employers' Efforts to Diversify Their Workforces.....	211
iii.	An Employer's Incorrect Focus on Liability- Avoidance	213
iv.	Likely Impermanence of the Standard	214
V.	Conclusion	214

I. INTRODUCTION

The disparate-impact theory of employment discrimination has remained controversial since its inception. The amended Title VII of the Civil Rights Act of 1964¹ bans race-neutral employment practices or policies, such as employment tests, that have a statistically adverse impact on a racial group, even if there is no intent to discriminate by the employer.

Conservatives argue that employers should not be held liable for employment-test results absent intentional discrimination. They believe that the disparate-impact prohibition creates quotas and dual standards because employers are forced to take preemptive steps to assure employment numbers come out “right.”² One recent example of the argument that disparate impact creates quotas involves the controversial lawsuit in *Wal-Mart Stores, Inc. v. Dukes*,³ which was recently thrown out by the Supreme Court.⁴ Plaintiffs “claim[ed] that Wal-Mart owes billions of dollars to as many as 1.5 million women who they say were unfairly treated

1. 42 U.S.C. §§ 2000e–2000e-2 (2006).

2. For a criticism of disparate impact, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 205–41 (1992); Richard A. Epstein, *Ricci vs. DeStefano*, *FORBES* (June 29, 2009, 2:30 PM), <http://www.forbes.com/2009/06/29/ricci-destefano-new-haven-supreme-court-affirmative-action-opinions-columnists-firefighters.html>; see generally Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, *BRIEFLY . . . PERSP. ON LEGIS. REG. & LITIG.*, Dec. 2001, at 1 (discussing the “disparate-impact approach” and its problems in application in the private sector).

3. 564 U.S. ___, 131 S. Ct. 2541 (2011).

4. Adam Liptak, *Justices Rule for Wal-Mart in Class-Action Bias Case*, *N.Y. TIMES*, June 20, 2011, www.nytimes.com/2011/06/21/business/21bizcourt.html?pagewanted=all.

on pay and promotions”⁵ But in a brief supporting Wal-Mart, lawyers for Costco argued that certifying the class would make employers resort to “surreptitious quotas” as a way to avoid these suits.⁶

On the other hand, progressives’ view the disparate-impact statute as an integral tool for removing unnecessary barriers for minorities seeking gainful employment, and as an engine of social reform.⁷ For example, progressives argue that women should have been able to use statistical models to show that discrimination is widespread at Wal-Mart. Without disparate-impact suits, they argue, women will be unfairly held back from management positions.

The Wal-Mart example illustrates part of the ideological struggle over disparate impact. Another part of this struggle that raises an equally difficult legal and public policy question is: To what extent does the disparate-impact statute and the Constitution allow or require employers to throw out employment-test results with the intent of diversifying their workforces?

Justice Antonin Scalia has weighed in on this debate. In 2009, he declared in *Ricci v. DeStefano*⁸ that “the war between disparate impact and equal protection will be waged sooner or later,”⁹ implying that disparate impact will inevitably be struck down as unconstitutional. But in *Lewis v. City of Chicago*,¹⁰ just one year later, he wrote in a unanimous opinion that the Court’s “charge is to give effect to the [disparate-impact] law Congress enacted,”¹¹ implying that disparate impact is constitutional. Read together, these statements seem contradictory, but this is the nature of the struggle over disparate impact: In some situations, the application of the disparate-impact statute seems legally permissible, but in other situations, it seems impermissible.

The *Ricci* case, where White firefighters challenged the constitutionality of disparate impact, neatly illustrates this battle over disparate impact, because the case incited ideological conflict and racial politics.¹² In *Ricci*,

5. Adam Liptak, *Supreme Court to Weigh Sociology Issue in Wal-Mart Discrimination Case*, N.Y. TIMES, Mar. 28, 2011, at A17, available at 2011 WLNR 5971963.

6. Brief for Costco Wholesale Corp. as Amicus Curiae Supporting Petitioner, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___, 131 S. Ct. 2541 (2011) (No. 10-277).

7. See generally Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010) (arguing against making racially attentive efforts, like complying with disparate impact, the equivalent of reverse discrimination).

8. 564 U.S. ___, 129 S. Ct. 2658 (2009).

9. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).

10. 560 U.S. ___, 130 S. Ct. 2191 (2010).

11. *Lewis v. City of Chicago*, 560 U.S. ___, 130 S. Ct. 2191, 2200 (2010).

12. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1367 (2010) (illustrating a change in policy).

the City of New Haven, after a heated debate, threw out the examinations of over a hundred firefighters who took a promotional test, when it was discovered that too few minorities would have been promoted.¹³ New Haven authorities thought that they would be liable in a disparate-impact suit if the test were certified for use to determine promotions.¹⁴ Because the city discarded the promotional test, a group of White firefighters (and one Hispanic), who likely would have been promoted based on their good test performance, sued the city.¹⁵ One claim alleged intentional discrimination under Title VII, and the other claim alleged discrimination under the Equal Protection Clause.¹⁶

In a 5-4 decision, the Supreme Court held in *Ricci*—now one of the most important race discrimination cases in the Court’s history¹⁷—that the city intentionally discriminated against the White firefighters by throwing out the test.¹⁸ The Court found that the city, in voluntarily trying to prevent a disparate-impact suit from minorities by discarding the test, violated Title VII’s prohibition on intentional discrimination, or disparate treatment.¹⁹ According to the Court, the city’s primary reason for discarding the test was that the main beneficiaries of the test were White.²⁰ The Court then adopted a new rule to reduce the tension between Title VII’s disparate-impact and disparate-treatment provisions: “[R]ace-based action like the city’s in this case is impermissible under Title VII unless the employer can demonstrate a strong-basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”²¹ The Court held that the city did not have a strong basis in evidence that they would be held liable in a disparate-impact suit.²²

Because there was a statutory fix under Title VII, the Court dismissed the equal protection issue.²³ The equal protection issue, simply put, is whether the disparate-impact statute is so race-conscious that Congress was prohibited from enacting it in the first place. The Court did not con-

13. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2664.

14. *Id.*

15. *Id.*

16. *Id.*

17. Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 582 (2010).

18. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2664.

19. *Id.*

20. *Id.* at ___, 129 S. Ct. at 2673.

21. *Id.*

22. *Id.* at ___, 129 S. Ct. at 2677.

23. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2664–65 (2009).

sider whether the new strong-basis standard would pass muster under equal protection scrutiny.²⁴

However, Justice Scalia, in concurrence, strongly hinted that disparate impact is unconstitutional.²⁵ Scalia argued that the strong-basis standard *Ricci* created postpones the day when the Court will have to confront the hard question of whether disparate impact is consistent with the Constitution's guarantee of equal protection.²⁶ In other words, under what circumstances can employers intentionally discriminate in order to avoid unintended discrimination that results from facially-neutral policies? Professor Richard Primus argues that the equal protection issue is legally complex and symbolically sensitive since Title VII's disparate impact "requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification."²⁷

Quite possibly, the newly created strong-basis standard, even if applied as though there was a legitimate fear of disparate impact, would not satisfy the Constitution's ban on intentional discrimination. In one provocative article, Linda Greenhouse argues that "race remains an unfinished project of the Roberts court," and that the question over the constitutionality of disparate impact has "hung heavy, and [remained] unanswered."²⁸

In the other recent disparate-impact decision, *Lewis v. City of Chicago*, the Court resolved a technical issue over the scope of disparate impact's statute of limitations. The Court unanimously held that when an employer institutes an employment practice, like a test, that has a disparate impact on a group, employees may challenge the practice each time the employer uses it.²⁹ This holding effectively increases the scope of disparate-impact's statute of limitations in certain situations because employees can now sue using the disparate-impact theory years after a discriminatory test is first used. Previously, an employer could lock in a discriminatory employment practice in perpetuity if an employee did not sue right away, since the statute of limitations would have passed.

After *Lewis* and *Ricci*, employers are left with a puzzling legal framework for dealing with employment tests that adversely affect a group. Employers have one option of using exam results that have an adverse impact, and risk lawsuits from the adversely affected group (possibly

24. *Id.*

25. *Id.* at ___, 129 S. Ct. at 2682 (Scalia, J., concurring).

26. *Id.* at ___, 129 S. Ct. at 2681–82 (Scalia, J., concurring).

27. Primus, *supra* note 12, at 1342.

28. Linda Greenhouse, *Is Anyone Watching?*, N.Y. TIMES, Feb. 23, 2011, opinionator.blogs.nytimes.com/2011/02/23/is-anyone-watching/.

29. *Lewis v. City of Chicago*, 560 U.S. ___, 130 S. Ct. 2191, 2200 (2010).

years after the test was created).³⁰ Or, employers can disregard those results that adversely affected one group, and risk lawsuits from those who stood to benefit from the test.³¹ Although this legal framework can be puzzling, it still furthers the important policy goal of disparate impact by removing artificial barriers to employment for all job applicants.

This Note offers a solution to these disparate-impact conundrums. First, I propose that courts avoid the potential constitutional showdown over disparate impact. Second, I argue that the strong-basis standard should be kept because this standard is the best policy and legal standard for dealing with *Ricci*-like situations, which exhibit considerable tension between the disparate-impact and disparate-treatment prongs of Title VII.

This Note fills a void in disparate-impact scholarship by offering an overlooked way courts should analyze the constitutional debate over disparate impact: the constitutional avoidance reading. The canon of constitutional avoidance holds that between two plausible readings of a statute—one that raises serious constitutional problems and another that does not—a court should construe the statute in a way that avoids the constitutional issue as long as that reading is not contrary to the intent of Congress. Congress expressly codified the disparate-impact statute to run in tandem with disparate treatment. And one way to ensure that the two provisions run in tandem was for the *Ricci* Court to construe Title VII to include a strong-basis standard as a way to avoid the constitutional issue.³²

The constitutional avoidance reading urges courts to keep avoiding the equal protection issue by using the strong-basis standard to mediate the conflict between disparate impact and disparate treatment. The strong-basis standard also helps ameliorate the tension between equal protection norms and public-employer discrimination, especially when public employers throw out tests if too few minorities pass. Under *Ricci*, if the city actually had a strong basis to believe that they would be liable for disparate impact and they discarded the test for legitimate reasons, the city would not have violated the Constitution for intentionally discriminating

30. Cynthia Dizikes & David Savage, *Supreme Court Rules in Favor of Blacks for Chicago Firefighter Jobs*, CHI. TRIB., May 25, 2010, at A6, available at 2010 WLNR 10744991.

31. *Id.*

32. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2673 (2009). The proposed standard that the *Ricci* Court rejected—a good-cause standard—would too easily allow an employer to throw out facially race-neutral tests like the test in *Ricci*. Under this lighter evidentiary standard, an employer could racially balance their workforce by throwing tests out in “good faith” until the numbers came out right, which may violate equal protection norms.

against the White firefighters. This narrower form of disparate impact that *Ricci* creates should survive because it does not raise serious constitutional issues.

Although *Ricci* implicitly avoided the constitutional issue, I argue that courts should explicitly avoid the constitutional issue in future cases if a litigant makes a wholesale challenge to disparate impact. Those arguing for avoidance should try to persuade courts to further interpret the disparate-impact statute in a way that allows the strong-basis standard to alleviate equal protection concerns.

This Note proceeds in three parts. Part II surveys *Ricci* and *Lewis*, and analyzes the ongoing struggle over disparate impact. Part III examines the confrontation between the Equal Protection Clause and disparate impact, and offers the constitutional avoidance reading as a solution to this conflict. An important wrinkle examined here is that if a court wants to strike down disparate impact, they would have to confront the equally contested issue of whether Section Five of the Fourteenth Amendment authorizes Congress to create the disparate-impact statute as a means of enforcing the Equal Protection Clause. Part IV defends the strong-basis standard by assessing the policy arguments for using this standard and the arguments against using the standard. This Note concludes that the strong-basis standard is the best standard available.

II. EXPLAINING THE CONFUSION IN RICCI AND LEWIS

A. Legal Background

Title VII makes it unlawful for an employer “to discriminate against any individual . . . because of such individual’s race.” Title VII prohibits two types of discrimination: (1) disparate-treatment discrimination, which is intentional discrimination, and (2) disparate-impact discrimination, which is unintentional.³³ The Supreme Court explained that “[d]isparate treatment’ is . . . the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race”³⁴ On the other hand, a disparate-impact violation hap-

33. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009); see also Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705 (explaining that intent need not be shown in a claim involving disparate impact).

34. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); see also *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 140 (2008) (defining disparate treatment as intentional discrimination); HENRY H. PERRITT JR., *CIVIL RIGHTS IN THE WORKPLACE* 337 (3d ed. 2001) (providing an introductory overview of the mixed-motive analysis). Disparate treatment bans two different categories of discrimination. Disparate treatment bans “employers [from] applying different rules to employees of different races”; namely, “people are treated disparately, and therein lies the illegality.” Primus, *supra* note 12, at 1350; see also

pens when facially race-neutral employment policies, like tests, have an adverse impact on a particular race even if the employer did not intend to create the adverse result.³⁵

The Court created the disparate-impact doctrine in *Griggs v. Duke Power Co.*³⁶ by interpreting Title VII to proscribe “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”³⁷ Disparate impact targets employment practices that have no business necessity, which means that “[i]f an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited.”³⁸ The disparate-impact theory has been criticized significantly more than disparate treatment, and it suffered a near-death experience in *Wards Cove Packing Co. v. Atonio*,³⁹ which significantly weakened the doctrine.⁴⁰ But after a firestorm of protest, Congress codified the disparate-impact theory into Title VII when they enacted The Civil Rights Act of 1991.⁴¹ Currently, the disparate-impact statute has been used almost exclusively to challenge the employment tests⁴² of public employers.⁴³ Disparate impact lawsuits are ex-

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (finding that a court must determine whether the employer is treating some people less favorably than others because of protected characteristics). The second strand of disparate treatment covers “illicit employer motive, whether or not those motives lead to disparities in the individuals of different races.” Primus, *supra*, at 1350. In all cases, the plaintiff must show that the employer acted with discriminatory intent, which is often accomplished by using comparators—other employees who are similar to the plaintiff in all respects except for the protected characteristic. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 n.3 (2011); see also Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 206 (2009) (finding that a similarly situated comparator is not required but that “the absence of a comparator is often fatal to a claim”).

35. See *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2673.

36. 401 U.S. 424 (1971).

37. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

38. *Id.*

39. 490 U.S. 642 (1989).

40. Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 411, 412 (2010).

41. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2 et seq.); Sullivan, *supra* note 40.

42. Selmi, *supra* note 33 (finding that written tests are “the only category of claim for which legal standards have evolved to evaluate the permissibility of employment practices”).

43. The reason public employment tests are challenged so often is that “in thirty-four states, state and local government employers are required . . . to use competitive examinations to select applicants for [future] employment opportunities.” Brief for Pac. Legal Found. as Amicus Curiae Supporting Respondent at 21, *Lewis v. City of Chicago*, 560 U.S. ___, 130 S. Ct. 2191 (2010) (No. 08-974).

tremely difficult to win, but the ones that are meritorious do help open doors for minorities.⁴⁴

There are three components to make out a case under the disparate-impact statute. First, a plaintiff must establish prima-facie violation of the statute by showing that an employer uses a particular employment practice, like a test, that causes a disparate impact on a race.⁴⁵ Second, an employer may defend against the suit by demonstrating that their employment practice is job related for the position in question and consistent with business necessity.⁴⁶ Third, even if the employer meets that burden, a plaintiff can still succeed by proving that the employer refused to adopt an alternative test that has less disparate impact and serves the employer's legitimate needs.⁴⁷

One major procedural hurdle for plaintiffs under Title VII is that the plaintiff must file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC).⁴⁸ Plaintiffs must file their charges with the EEOC three hundred days after the allegedly discriminatory act occurs or the claims are time-barred by the statute of limitations.⁴⁹

B. *Lewis v. City of Chicago: Expanding the Disparate-Impact Statute of Limitations*

In 1995, the City of Chicago administered a pen-and-pencil examination to over 26,000 applicants seeking to become firefighters.⁵⁰ Once the exams were scored, the city announced that the applicants were sorted into three categories based on their scores: well qualified, qualified, and not qualified.⁵¹ The city then created an official hiring list that reflected

44. Selmi, *supra* note 33, at 706 (“[T]he reality has been that disparate impact claims are more difficult—not easier—to prove than claims of intentional discrimination.”). Selmi’s empirical research on disparate impact reveals that few disparate impact claims are brought in the first place, and out of those, only a handful ever win. *Id.* at 738–40; e.g. *United States v. City of New York*, 683 F. Supp. 2d 225 (E.D.N.Y. 2010) (deciding what would quickly become a prominent, meritorious disparate-impact suit).

45. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

46. *Id.*

47. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); 42 U.S.C. § 2000e-2(k)(1)(C).

48. *Lewis v. City of Chicago*, 560 U.S. ___, 130 S. Ct. 2191, 2196–97 (2010). See generally Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 503–07 (2010) (explaining Title VII’s complex procedural scheme).

49. 42 U.S.C. § 2000e-5(e)(1) (2006).

50. *Lewis*, 560 U.S. at ___, 130 S. Ct. at 2195.

51. *Id.* at ___, 130 S. Ct. at 2195–96. Well-qualified applicants scored the highest on the exam, and the city would randomly draw from this group to fill the open positions. *Id.* at ___, 130 S. Ct. at 2195. Applicants that scored in the unqualified range did not pass the test and would not be chosen. *Id.* Those that scored between the well-qualified and not quali-

the breakdown of results.⁵² Then the city exclusively hired the well-qualified applicants off this list for years.⁵³

A class of African-Americans who scored in the qualified range on the examination, and had not been hired, sued claiming that the tests had an impermissible disparate impact.⁵⁴ The first Black applicant filed an EEOC charge less than three-hundred days after Chicago first hired well-qualified firefighters off the list, but this was more than three-hundred days after the city created the hiring list that categorized the firefighters. The question presented was: When an employer adopts an employment practice that discriminates in violation of the disparate-impact provision, must the plaintiff file a claim within three-hundred days after the announcement of the practice (announcing the hiring list), or within three-hundred days after the employer executes the practice (the employer hires off the discriminatory list)?⁵⁵

The Supreme Court held that Title VII dictates the latter.⁵⁶ The firefighters can file their Title VII disparate-impact claim within three-hundred days after the employer uses any unlawful practice (like using the results of a discriminatory test to make the hiring decision) that causes a disparate impact, as long as the plaintiff can claim that each element of a disparate impact claim is met.⁵⁷

The Court was not persuaded by the city's policy concerns that employers will likely face new disparate-impact suits for practices they have used

fied cut-off scores were deemed qualified. *Id.* Qualified applicants had passed, but they were told that it was unlikely they would be hired. *Id.* at __, 130 S. Ct. at 2195–96. However, the city told qualified applicants that because it is not possible to predict how many applicants will be hired in the next few years their names will be kept on the hiring list for as long as that list is used. *Id.* at __, 130 S. Ct. at 2196.

52. *Lewis*, 560 U.S. at __, 130 S. Ct. at 2196.

53. *Id.*

54. Brief for the United States as Amicus Curiae Supporting Petitioners at 5, *Lewis v. City of Chicago*, 560 U.S. __, 130 S. Ct. 2191 (2010) (No. 08-974). It was clear that the test had a statistical adverse impact for African-Americans, which constitutes a *prima facie* case under the disparate-impact statute. *Lewis*, 560 U.S. at __, 130 S. Ct. at 2198.

55. *Lewis*, 560 U.S. at __, 130 S. Ct. at 2195–96.

56. *Id.* at __, 130 S. Ct. at 2197.

57. *Lewis*, 560 U.S. at __, 130 S. Ct. at 2197. The Court reasoned that the principle inquiry was actually whether hiring only from the discriminatory list, although created years before, was itself a Title VII violation. *Id.* The Court held that hiring off the list was an “employment practice” under the disparate-impact statute, and that the city *uses* that employment practice every time the list is relied upon for hiring. *Id.* A disparate-impact violation occurs whenever a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact. *Id.* And the city *used* a discriminatory employment policy both when the city created the list and each time it hired from the list. *Id.*

regularly for years.⁵⁸ The Court reasoned that either way the statute is read it produces puzzling results.⁵⁹ The city's reading would allow an employer to use a discriminatory employment practice indefinitely if no timely charge was brought, inducing plaintiffs to sue before they have any basis for believing that they will not be hired.⁶⁰ Justice Scalia concluded that the Court has to give effect to the statute Congress enacted, even if employees are now allowed to sue years after the test was created.⁶¹

Lewis is important because it shows that the Roberts Court is serious about reading Congress's intent towards Title VII neutrally, and that the Court is not committed to weakening the disparate-impact theory.⁶²

C. *Ricci v. DeStefano: Creating the Strong-Basis Standard*

In *Ricci*, the City of New Haven instituted an employment test to fill the leadership positions in the fire department.⁶³ Once the results came back, it was evident that African-Americans and Hispanics scored poorly.⁶⁴ If the test was used to determine promotions, Whites would acquire nearly all of the promotions, and no African-Americans and only two Hispanics would have scored high enough to be promoted.⁶⁵ Since so few minorities would be promoted, the city was concerned that using the test would subject the city to disparate-impact liability claims from African-Americans.⁶⁶ Ultimately, the city discarded the test.⁶⁷

58. By allowing plaintiffs to sue years after a practice was first set in place, the ruling expanded disparate impact. Michael Newman & Faith Isenhath, *Lewis v. City of Chicago: The Expansion of Disparate Impact Claims*, FED. LAW., Oct. 2010, at 13.

59. *Lewis*, 560 U.S. at ___, 130 S. Ct. at 2200.

60. Newman & Isenhath, *supra* note 58.

61. *Lewis*, 560 U.S. at ___, 130 S. Ct. at 2200.

62. See John B. Lough Jr., *Test Results: Despite the Ruling in Lewis, Employees Still Face an Uphill Battle in Discrimination Cases*, L.A. LAW., Feb. 2011, at 35 ("While *Lewis* does not signal a proemployee trend by the Court under Chief Justice John Roberts, workers can take some small solace that the Roberts Court is probably not antiworker."); Carl Cecere, *The Court Challenges Expectations in Review of Firefighter Testing*, SCOTUSblog (May 27th, 2010, 3:55 PM), www.scotusblog.com/2010/05/the-court-challenges-expectations-in-review-of-firefighter-testing/.

63. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2665 (2009). Once the test was completed, the city was supposed to certify a ranked list of applicants who passed the test, and the city was required to fill each new vacancy by choosing one candidate from the top three scorers on the list. *Id.* The city hired a company that specializes in designing promotional examinations for fire departments to create the test. *Id.* The test was designed with painstaking analysis to ensure that it was race neutral; at every stage of the job analysis, the testing company deliberately oversampled minority firefighters to ensure that the results would not favor White candidates. *Id.* at ___, 129 S. Ct. at 2666.

64. *Id.* at ___, 129 S. Ct. at 2664.

65. *Id.* at ___, 129 S. Ct. at 2666.

66. *Id.* at ___, 129 S. Ct. at 2667.

67. *Id.* at ___, 129 S. Ct. at 2664.

The *Ricci* plaintiffs sued the city for throwing out the test, contending that the city discriminated against White firefighters under the disparate-treatment prohibition.⁶⁸ The Supreme Court reversed the lower courts⁶⁹ and awarded summary judgment to the firefighters on their Title VII disparate-treatment claim but dismissed the equal protection claim.⁷⁰

The Court found that if they resolved the case on Title VII grounds, they could avoid the fundamental constitutional question of whether the disparate-impact prohibition violates the Constitution. Justice Kennedy began with the premise that discarding the tests by the city violates Title VII's disparate-treatment prohibition, unless there is some valid defense.⁷¹ Unlike the district court, which called the city's action "race neutral" since all of the tests were discarded, the Court held that discarding the test was express, race-based decision-making that violated Title VII's disparate-treatment command since the city thought too many Whites and not enough minorities would be promoted.⁷² Put in a slightly different way, the city generally could not tell the passing firefighters that they would not be promoted simply because others failed.⁷³

However, Kennedy's opinion stated that the city's employment action, taken with the intent to avoid disparate impact, could sometimes be a defense to a disparate-treatment suit.⁷⁴ The problem was delineating when the threat of disparate-impact liability could be a defense, and how much evidence is necessary for that defense to be valid. The Court rejected the plaintiff's proposed solution.⁷⁵ It also rejected the city's proposed standard that an employer's mere good-faith belief that its actions

68. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2664.

69. *Id.* at ___, 129 S. Ct. at 2681.

70. *Id.*; see Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 256–57 (2009) (finding that it was unusual for the *Ricci* Court to not remand the case to the district court for reconsideration under the strong-basis standard).

71. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2673.

72. *Id.*

73. Donald J. Kochan, *On Equality: The Anti-Interference Principle*, 45 U. RICH. L. REV. 431, 457 (2011).

74. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2673 (citing 42 U.S.C. § 2000e-2(a)(1)). But see *id.* at ___, 129 S. Ct. at 2700 (Ginsburg, J., dissenting) (finding no "intra-statutory discord" between disparate impact and disparate treatment). Indeed, *Ricci* is the first case to ever identify tension between the disparate-treatment and disparate-impact discrimination. *Id.*

75. The plaintiffs argued that avoiding an unintentional disparate impact is never a defense to intentional, disparate-treatment discrimination. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2674. But Kennedy rejected this argument because Congress expressly codified the disparate-impact provision to run in tandem with disparate treatment, and the Court has to "give effect to both provisions where possible." *Id.* Kennedy also rejected the firefighters' suggestion that an employer must be in violation of the disparate-impact provision before the employer can use the need to comply with disparate impact as a defense to disparate

are necessary to comply with disparate impact should be enough to justify race-conscious conduct.⁷⁶ Allowing employers to intentionally discriminate when there is only a good-faith belief of potential disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. The Court was concerned that this good-cause standard would create a de facto quota system, and an employer could discard test results with the intent of obtaining the employer's preferred racial balance.⁷⁷

In deciding on a standard, the *Ricci* Court borrowed from equal protection jurisprudence to relieve the newfound tension between the disparate-treatment and disparate-impact prongs of Title VII. Under the Equal Protection Clause, the Court has held that government can take race-based action—such as creating affirmative action programs to benefit minorities—to remedy past racial discrimination if there is a strong basis in evidence that the remedial actions are necessary.⁷⁸ In the equal protection context, there is a tension between eliminating the effects of past discrimination and abolishing all governmental race discrimination. This is similar to the tension between disparate treatment and disparate impact; disparate treatment seeks to bar all race-conscious action whereas disparate impact encourages race-conscious action to remedy racial imbalances in the workplace. The Court then borrowed the equal protection strong-basis standard to create a new Title VII strong-basis standard:

[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.⁷⁹

treatment, since voluntary compliance is the preferred means of enforcing Title VII, this proposed standard would halt compliance efforts. *Id.*

76. *Id.* at ___, 129 S. Ct. at 2674–75.

77. *Id.* at ___, 129 S. Ct. at 2675.

78. *Id.* at ___, 129 S. Ct. at 2675. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) the Court applied the strong-basis standard to an affirmative action program and struck it down because “an amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota.” *Croson*, 488 U.S. at 499. The *Croson* Court found that governments “may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination,” and the strong-basis standard requires that “they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.” *Id.* at 504.

79. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2677; see also *New Supreme Court Ruling Rocks Your Title VII World*, MICH. EMP. L. LETTER, Aug. 2009, at 1 (stating that *Ricci* created the new strong-basis standard).

Applying the strong-basis standard to Title VII gives effect to both the disparate-treatment and the disparate-impact provisions.⁸⁰ An employer can only take a race-based action that violates disparate treatment if the employer has a strong basis in evidence that it would be liable under the disparate-impact statute. In *Ricci*, this means that the city would have had to collect enough evidence before throwing out the test to show that it had a strong basis for believing that it would face disparate-impact liability. However, the employer does not have to prove an actual violation of disparate impact against itself to discard the tests. This gives the employer some discretion to throw out tests that have adverse impacts.

After creating the strong-basis standard, the Court found that the city did not have a strong basis to believe they would be liable for disparate impact, and thus could not discard the test.⁸¹ Kennedy acknowledged that there was a prima facie case of disparate-impact liability, since the pass rate for minority candidates was about half the pass rate for White candidates.⁸² Yet, even though there was a prima-facie case, the city still needed some evidence that the exams were not job related, or that there existed a less-discriminatory alternative, to pass the strong-basis standard.⁸³ The Court found that the test was job related, and there was no less discriminatory test available.⁸⁴ Justice Kennedy's opinion also created a confusing defense to a potential disparate-impact suit in case the Black firefighters sued.⁸⁵

In the final chapter of this case, the White firefighters settled their claims of bias for about \$2 million in July 2011.⁸⁶ The settlement ended a seven-year-long legal battle that sparked national debate over the racial justice of disparate impact.⁸⁷

80. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2676.

81. *Id.* 564 U.S. at ___, 129 S. Ct. at 2678.

82. *Id.*

83. *Id.*

84. *Id.*

85. If the city uses the tests and the city faces a disparate-impact suit, then the city could "avoid disparate impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2681. So the likelihood of disparate-treatment liability for an employer is a possible defense to a disparate-impact suit. LEX K. LARSON & ARTHUR LARSON, EMPLOYMENT DISCRIMINATION § 23.07 (2010). See generally Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald A New Disparate Impact?*, 90 B.U. L. REV. 2181, 2181, 2222 (2010) (explaining this possible new defense to a disparate-impact suit, but finding that all interpretations of this defense have weaknesses and that ultimately courts will have to decide how this defense can be used).

86. *New Haven Firefighters Settle Claims of Racial Bias*, N.Y. TIMES, July 28, 2011, www.nytimes.com/2011/07/29/nyregion/new-haven-firefighters-settle-race-discrimination-claims.html?_r=1&src=rechp.

87. *Id.*

D. *Why Lewis and Ricci Created a Catch-22 in Employment Testing*

These cases show reasonable people can disagree about the scope of the disparate-impact statute. Under this *Ricci-Lewis* framework, employees not hired are going to want to take advantage of the extension of the statute of limitations under *Lewis* to sue whenever there is a statistical disparity from an employment practice, even if it was years after it was first instituted. However, employers are incentivized under *Ricci* to continue to use test results or practices that they know are discriminatory, like the City of Chicago did in *Lewis*, because they do not want to be held liable by those who benefited. This framework creates a “damned if you do, damned if you don’t situation”⁸⁸ for employment testing. If the employer throws the test out, they will face a disparate-treatment suit by those that stood to benefit. If they keep the test, those that did not do well will sue. This is a Catch-22⁸⁹ because it seems no matter what the outcome of a test (apart from a perfectly proportional racial and gender pass rate) there is likely to be a lawsuit. Indeed, most employment tests have a disparate impact on at least one protected group.⁹⁰

The *Ricci-Lewis* framework will affect public employers more adversely than private employers. Private employers “have learned to live with the employment discrimination laws” by employing “large staffs . . . to implement and monitor procedures” to deal with “employment discrimination and affirmative action.”⁹¹ But public employers are less sophisticated and have not adapted so easily, which is a concern given the tremendous impact of public jobs on the safety of the community.⁹²

88. Transcript of Oral Argument at 8, *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328) (statement of Justice David Souter).

89. Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1552 (2009) (defining Catch-22 as a “no-win situation built on illogic and circular reasoning”).

90. Gail Heriot, *Disparate Impact and the Soft Coercion of the Uniform Guidelines on Employee Procedures*, SCOTUSblog, Feb. 23, 2010, <http://www.scotusblog.com/2010/02/disparate-impact-and-the-soft-coercion-of-the-uniform-guidelines-on-employee-procedures/> (“[N]early all qualifications have a substantial disparate impact. . . . Indeed, it would be difficult to find a single, significant job qualification that does not have a substantial disparate impact on some protected group.”). One expert industrial/organizational psychologist testified in the *Ricci* litigation that “[n]ormally, [W]hites outperform ethnic minorities on the majority of standardized testing procedures.” *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2668 (first alteration in the original).

91. PATRICIA A. BRANDIN & DAVID A. COPUS, IN DEFENSE OF THE PUBLIC EMPLOYER xxiii–xxiv (1988) (“[C]urrently the volume of public sector employment discrimination litigation is increasing . . . under Title VII . . .”).

92. *Id.* at xxviii.

Police and fire employees . . . have an immediate impact on the safety of members of the public. . . . For this reason, decisions as to whether to hire and retain employees in these job categories cannot be made with sole reference to the desires of the employ-

This creates a dilemma for public employers.⁹³ If public employers settle employment lawsuits, they will likely get rid of their employment-discrimination claims. But if they hire unqualified employees, they will be liable to the public if these employees do not perform.⁹⁴

One question lurking in this debate is whether creating better tests will stop adverse impacts. Unfortunately, the short answer is that better tests have not been proven to reduce adverse impacts. Some scholars claim that there are better testing alternatives that municipalities could use that would have less of an adverse impact such as assessment-center testing.⁹⁵ However, there is little empirical evidence that assessment centers reduce the disparate impact of tests.⁹⁶

One way to reduce tests that have an adverse impact is to throw them out and start over, but this runs squarely into the problem of complying with the strong-basis standard. Some commentators argue that “litigators can meet [the strong-basis standard] burden through statistical techniques that are specifically geared toward gauging how a test or performance assessment may be biased in favor of one group or against another.”⁹⁷

ing unit or the employees themselves, but need to made with a view towards any resulting impact on the public.

Id.

93. *Id.*

94. *Id.*

95. See Harris & West-Faulcon, *supra* note 7, at 155 nn.290–91. An assessment center is a skills-based test in which candidates are judged on how well they do on simulated exercises. There is a whole literature on how test consultants can avoid disparate impacts. See, e.g., DAN BIDDLE, ADVERSE IMPACT AND TEST VALIDATION: A PRACTITIONER’S GUIDE TO VALID AND DEFENSIBLE EMPLOYMENT TESTING xxi–xxv (2d. ed. 2006) (describing different adverse impact analyses programs and how they can be used to evaluate employment testing); Nancy T. Tippins, *Adverse Impact in Employee Selection Procedures From the Perspective of an Organizational Consultant*, in ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION (James L. Outtz ed., 2010) (discussing various ways to calculate adverse impact in testing programs and strategies to minimize its effects once discovered). In *Ricci*, assessment-center testing was brought up during a hearing as a better alternative to the oral and written tests that were used. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2669 (2009).

96. Greg Mitchell, Response, *Good Scholarly Intentions Do Not Guarantee Good Policy*, 95 VA. L. REV. 109, 111 (2010), available at <http://www.virginialawreview.org/inbrief/2010/02/28/mitchell.pdf>. For example, in a recent analysis of the research examining racial differences in assessment-center evaluations, scholars found “that Black-White mean differences for assessment centers are not as small as has been suggested by a number of researchers.” Michelle A. Dean et al., *Ethnic and Gender Subgroup Differences in Assessment Center Ratings: A Meta-Analysis*, 93 J. APPLIED PSYCHOL. 685, 690 (2008). More research is necessary to draw any conclusions as to the benefit of assessment centers for reducing disparate impacts. *Id.*

97. Jason M. Szanyi & Katarina Guttmanova, *Presenting a “Strong Basis in Evidence”: How Lawyers Should Use Statistics to Shape the Impact of Ricci v. DeStefano on Title VII Litigation*, 4 HARV. L. & POL’Y REV. (Online) (Feb. 4, 2010), <http://>

Whether sophisticated statistical analysis will actually ease the burden of proving there is a strong-basis for throwing out a test is a difficult question because the *Ricci* Court chose a burdensome standard.

The point here is that there are no quick answers for solving the employment-testing Catch-22 since most employment tests have a disparate impact. Nevertheless, disparate impact still has a redeeming public policy rationale because the theory continues to play a vital role in encouraging employers to create fair employment tests.

III. RESOLVING THE EMPLOYMENT TESTING CONUNDRUM ON THE CONSTITUTIONAL LEVEL

Instead of addressing the equal protection issue in *Ricci*, the Court borrowed the strong-basis standard from equal protection to provide a statutory fix. The question remains: Does meeting the strong-basis standard ever justify discriminatory treatment under the Constitution? In the 1970s, scholars began questioning whether the disparate-impact theory in Title VII is constitutional, and now the debate is in its third round. The first round was the question presented in *Washington v. Davis*:⁹⁸ Does the Equal Protection Clause protect against government employment tests that cause an adverse impact? The *Davis* Court said “no,” and held that there is no constitutional violation for a disproportionate impact on a racial group from race-neutral practices.⁹⁹ The Constitution only forbids intentional discrimination. “In the second round, the issue was whether federal statutes prohibiting facially neutral practices with racially disparate impacts were valid only as commerce legislation or also as means of enforcing equal protection under Section Five of the Fourteenth Amendment.”¹⁰⁰ This second round of debate has not been formally resolved, but still has bearing on the current debate. Finally, the third round was prompted by Professor Primus, who first asked whether the Equal Protection Clause prohibits Congress from enacting Title VII’s disparate-im-

www.hlpronline.com/2010/02/szanyi-guttmannova; see generally Joseph L. Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences Than the U.S. Government’s ‘Four-Fifths’ Rule: An Examination of the Statistical Evidence in Ricci v. DeStefano*, 8 L. PROB. & RISK 171 (2009) (arguing that more careful statistical analysis in disparate impact cases would provide a better measure of the extent of adverse impact).

98. 426 U.S. 229 (1976).

99. *Washington v. Davis*, 426 U.S. 229, 238 (1976).

100. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003); see *infra* Part III.A.iv.

pact provision in the first place “because of [disparate impact’s] overt concern with race.”¹⁰¹

The reason there is a conflict between equal protection and disparate impact is because the “constitutional antidiscrimination doctrine—that is, the law of equal protection—has . . . the same substantive content as Title VII’s prohibition on disparate treatment.”¹⁰² Despite some differences, the doctrines are virtually the same.¹⁰³ In short, the Court defined equal protection and disparate treatment as both being opposed to disparate impact because disparate-impact discrimination is less morally objectionable than intentional discrimination.¹⁰⁴ This is why disparate treatment became the core concern of Title VII and the only antidiscrimination concern of the Constitution.¹⁰⁵

The current tension between equal protection and disparate impact can be framed as a question of whether the strong-basis standard provides enough protection against intentional discrimination by state employers.¹⁰⁶ It might be the case that if a state actor has a strong basis to be-

101. Primus, *supra* note 100, at 495–96 (“Pre-*Davis*, many courts and commentators believed that state actions *creating* disparate impacts violated equal protection; post-*Adarand*, one could well ask whether state actions *prohibiting* disparate impact violate equal protection.”) (emphasis in original). *Ricci* deliberately avoided this question.

102. Primus, *supra* note 12, at 1354, 1356; GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 32 (2d ed. 2007) (finding that “the statutory law of employment discrimination follows constitutional law in leaving the exact nature of what is prohibited without any precise definition”).

103. Primus, *supra* note 12, at 1354. The principle difference is that “[e]qual protection doctrine covers all government actors, whether or not they are employers, but it reaches no private parties,” whereas “Title VII reaches only employers, but it covers all employers, private or public, over a certain size.” *Id.* at 1354 n.69 (2010).

104. *See* Primus, *supra* note 12, at 1355–56 (emphasizing the conflicts between the doctrines of equal protection and disparate treatment and that of disparate impact doctrine). In other words, the disparate-impact statute reaches far “beyond punishing behavior that most Americans regard as morally unacceptable.” Richard Primus, *The Individual, Above All*, N.Y. TIMES (June 21, 2011, 12:21 PM), www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/the-individual-above-all.

105. *See* Primus, *supra* note 12, at 1354–55 (acknowledging largely procedural differences between equal-protection and disparate-treatment doctrines but stating that “the conceptual content of the two frameworks is the same”); *see also* Selmi, *supra* note 33, at 706 (“[C]ourts never fully accepted the disparate impact theory as a legitimate definition of discrimination, or as a legitimate means of proving discrimination, and it was a mistake to think that they would.”).

106. Under the state action doctrine, only public employers can violate the Equal Protection Clause, not private employers. *See* *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988) (“Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny . . . and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.”); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“[The legislative power] does not authorize congress to create a code of municipal law for the regulation of private rights;

lieve that it would be liable for a disparate impact and discards the test, the Title VII carve-out (the strong-basis standard) may not be a constitutional defense to a claim of intentional discrimination for unlawfully discarding a test.

The following first explains Scalia's argument that disparate impact is unconstitutional and then moves on to the primary argument: Courts should avoid the difficult question of whether disparate impact is constitutional because the strong-basis standard provides enough protection against unlawful discrimination by public actors. A second argument is then made that the Supreme Court's failure to raise this question of disparate impact's constitutionality on their own accord is another reason why litigants and courts should avoid the question. Finally, I argue that another reason for avoidance is that in addressing the constitutionality of disparate impact, the Supreme Court would have to resolve the equally difficult question of the extent to which Congress can enact civil rights legislation under the Fourteenth Amendment.

A. *Scalia's Ricci Concurrence: Provoking the War between Disparate Impact and Equal Protection*

Scalia's concurrence represents the first judicial inquiry as to whether disparate impact is unconstitutional. His difficulty with Title VII's disparate-impact provision stems from the fact that it requires race-based action if an employer's practice has a disproportionate effect on a particular race.¹⁰⁷ In *Ricci*, this means that if there were a strong basis for the city to believe they would be liable under disparate impact, then the city could take a race-based action (throwing out the test) without facing liability from the White firefighters. But if there were an actual violation of disparate impact—a prima facie case plus no job-relatedness or a less-discriminatory alternative test—then the employer is required to remedy the racial imbalance or face liability if sued.¹⁰⁸

Because the federal government cannot discriminate based on race, Congress cannot enact laws like disparate impact that forces employers (private, state, or municipal) to discriminate based on race.¹⁰⁹ Scalia explains that:

but to provide modes of redress against the operation of state laws, and the action of state officers").

107. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

108. *Id.* Scalia puts "remedial" in quote marks in the opinion because he questions whether the city was fulfilling any remedial action when the city discarded the test.

109. *Id.* Under the state-action requirement, only public employers can violate the Equal Protection Clause, not private employers. *The Civil Rights Cases*, 109 U.S. at 11. But if Congress creates a statute that would be prohibited by the states under the Equal

Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision-making is . . . discriminatory.¹¹⁰

Although disparate impact is not a racial classification or quota on its face, disparate impact still can cause pernicious race-conscious action, according to Scalia.¹¹¹

However, an employer could devise a facially neutral hiring standard that intentionally discriminated against one race:

Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely, he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles.¹¹²

To Scalia, this threat of disparate-impact liability violates the colorblind view of the Constitution and gives employers an excuse to intentionally discriminate.¹¹³

Protection Clause, this is still a constitutional violation under the Fifth Amendment Due Process Clause. See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (stating that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment”).

110. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2682 (Scalia, J., concurring).

111. *Id.*; *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[O]utright racial balancing . . . is patently unconstitutional.”).

112. *Ricci*, 564 U.S. at ___, 129 S. Ct. at 2682 (Scalia, J., concurring).

113. *Id.* (alluding to the necessity for the government to “‘treat citizens as individuals, not as simply components of a racial, religious, sexual or national class’” (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995))); see also Destiny Peery, Comment, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 Nw. J. L. & Soc. POL’Y 473, 479 (2011) (characterizing *Ricci* as a return to the colorblind ideal). A majority of the Court has never adopted the full colorblindness principle that Scalia has advocated for, where race-conscious criteria can never be a factor in government decision-making. See Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 365–66 (2010) (explaining that repudiation of particular remedial methods results from determining that those “methods impose serious costs that presently outweigh any benefit the remedies produce”); see also Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 841–42 (2011) (theorizing that the *Ricci* and *Parents Involved* opinions show an increased willingness by the Court to at least “entertain[] the equivalence doctrine”). However, a plurality of the court has adopted this principle of race neutrality. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). One scholar considers decisions like these to be “reactionary colorblindness,” or “an anticlassification understanding of the Equal Protec-

B. *The Constitutional Avoidance Reading Allows Disparate Impact to Survive*

Because both equal protection and disparate treatment ban intentional discrimination, the tensions between disparate treatment and disparate impact create a parallel tension between equal protection and disparate impact. Whether this tension is enough to strike disparate impact is one of the most important questions in antidiscrimination law today.

This Note offers a new way courts and litigants should approach this constitutional issue: the constitutional-avoidance reading.¹¹⁴ This avoid-

tion Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.” Ian F. Haney López, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007); *see also* Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 82 (2000) (commenting on Robert Post’s lecture, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, and writing that “antidiscrimination law regulates the social practices that sustain the relative social position of [W]hites and [B]lacks, men and women . . . [or] the social practices that sustain group inequality”). Colorblindness is analytically similar to the concept of post-racialism:

[T]wenty-first century ideology that reflects a belief that due to racial progress the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action. According to post-racial logic the move is to effectuate a “retreat from race.” Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1589, 1594 (2009) (citations omitted); *see also* Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 994 (2010) (“If post-racialism were pressed to its fullest extent, it is unlikely that even statutory impact cases would survive.”).

114. Professor Richard Primus explains three other ways the Court could approach this constitutional issue. First, the general reading of *Ricci* (and Scalia’s reading) “means that the actions necessary to remedy a disparate impact violation are per se in conceptual conflict with the demands of the disparate treatment doctrine (and, implicitly, the demands of equal protection).” Primus, *supra* note 12, at 1344. If a court applies the general reading, disparate impact would be struck down as violating the Equal Protection Clause. *Id.* Second, under the institutional reading,

[A] municipal employer’s attempt to implement a disparate impact remedy is in conceptual conflict with the prohibition on disparate treatment (and implicitly with the requirements of equal protection) not because *any* disparate impact remedy is discriminatory but because public employers, unlike courts, are not authorized to engage in the race-conscious decision making that disparate impact remedies entail. *Id.* (emphasis in original). The institutional reading only allows courts to enforce disparate-impact remedies, not public employers; but disparate impact narrowly survives. *Id.* at 1345. Third, the visible-victims reading “holds that the problem in New Haven’s case was not the race-consciousness of the city’s decision per se but the fact that the decision disadvantaged determinate and visible innocent third parties—that is, the [W]hite firefighters.” *Id.* at 1345. Under this reading, disparate impact is constitutional as long as implementing the disparate-impact remedy does not create visible victims. *Id.*

ance reading urges the courts to be judicial minimalists and keep avoiding the constitutional question. The constitutional avoidance reading should be the most obvious reading—even the *Ricci* Court avoided the constitutional issue. This reading acknowledges that there is a real tension between disparate impact and equal protection, but advocates that courts should keep using and refining the strong-basis standard as a way to avoid the constitutional issue.

After all, Scalia's war on disparate impact might just be a warning to Congress that the Court has the nuclear option of striking disparate impact if Congress amends the strong-basis standard. Scalia did, of course, write the unanimous opinion in *Lewis* that also avoided the constitutional issue.

The avoidance reading uses a prudential rule of statutory interpretation called the canon of constitutional avoidance. The avoidance canon holds that if a statute is ambiguous and has more than one reasonable interpretation, then courts should choose the interpretation that avoids raising constitutional questions with the statute when disposing of the case.¹¹⁵ This avoidance principle has a historic pedigree¹¹⁶ as a statutory-default rule.¹¹⁷ The canon also has enjoyed tremendous support from the Su-

115. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 14 (2007); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13(g) (4th ed. 2007); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997). Under the classical avoidance canon, "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); see also *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407 (1909) ("It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one . . . it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.").

116. For instance, in 1787, Justice Iredell stated that an act "should be unconstitutional beyond dispute before it is pronounced such." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 24 n.1 (rev. ed. 1937); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) ("The question, whether a law be void for its repugnancy to the constitution . . . ought seldom, if ever, to be decided in the affirmative, in a doubtful case."); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.) ("[T]o authori[z]e this Court to pronounce any law void [requires] a clear and unequivocal breach of the constitution."); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring) (finding that because the power of judicial review "is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case").

117. See EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 237–39 (2008) (describing the canon of constitutional avoidance as "a supplemental default rule").

preme Court.¹¹⁸ As Hart and Wechsler's famous casebook argues, the avoidance canon is integral to understanding the proper and limited role of the federal courts in our system of government.¹¹⁹

The Court's modern articulation of the avoidance canon urges the Court to be even more deferential to Congress:

[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . [T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.¹²⁰

118. See *Pearson v. Callahan*, 555 U.S. 241 (2009) (withdrawing from strict adherence of a previously Court-mandated procedure, determining that to do so would "depart from the general rule of constitutional avoidance"); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them."); *Parker v. Los Angeles Cnty.*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."); *Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 572 (1947) ("Time and experience have given [the avoidance canon] sanction. They also have verified . . . that the choice was wisely made."); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

119. RICHARD H. FALLON JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 76–80 (6th ed. 2009) (stating that the constitutional avoidance doctrine is "the most important and controversial"); see ELHAUGE, *supra* note 117, at 239 (theorizing that the avoidance canon arose and/or serves a number of purposes in balancing the role of the judiciary with that of the legislature); LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 1 (2001) (describing the Court's use of the avoidance canon as "predicate[d] . . . on the separation of powers principle"); 1 ROTUNDA & NOWAK, *supra* note 115.

120. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citations omitted) (internal quotation marks omitted); see also *Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[The avoidance canon] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (alteration in the original); *United States v. X-Citement Video, Inc.*, 513

The Court finds that “where a statute is susceptible [to] two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided our duty is to adopt the latter.”¹²¹

The *Ricci* Court implicitly applied the avoidance canon. The Court was presented with at least two ways of interpreting the tension between disparate impact and disparate treatment: they could either interpret Title VII to include a strong-basis standard (or some other standard) to deal with the statutory tension, or rule on the constitutionality of disparate impact. The avoidance canon demanded that the Court borrow the strong-basis standard, so the Court would not have to rule on the constitutional issue.¹²²

Critics will argue that the avoidance reading here allowed the Court to rewrite Title VII in a way that Congress did not intend.¹²³ Critics also

U.S. 64, 78 (1994) (opting for the statutory interpretation that would not “raise serious constitutional doubts”); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500–01 (1979) (adhering to precedent dating as far back as 1804 holding that the Court must first decide whether the action at issue “would give rise to serious constitutional questions” before further determinations); *Int’l Assoc. of Machinists v. Street*, 367 U.S. 740, 749 (1961) (“[T]he restraints against unnecessary constitutional decisions counsel against their determination” unless the Court concludes it cannot interpret the statute in a way so as to avoid the constitutional question). This canon is followed out of respect for Congress, which we assume legislates in the light of their constitutional limitations. *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924). The canon is qualified by the proposition that “avoidance of a difficulty will not be pressed to the point of disingenuous evasion.” *George Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 379 (1933).

121. *United States ex rel Atty. Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909).

122. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 27 (2005) (explaining that judicial minimalists “seek to avoid taking stands on the biggest and most contested questions of constitutional law”); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996) (arguing for “decisional minimalism” by the Supreme Court, meaning “saying no more than necessary to justify an outcome and leaving as much as possible undecided”).

123. POPKIN, *supra* note 115 (finding that critics argue that the avoidance canon spreads “a mantle of legitimacy over a judge-created law and leaving in place a law that the legislature may have difficulty removing”); 1 ROTUNDA & NOWAK, *supra* note 115. For more critiques of the canon, see WILLIAM N. ESKRIDGE JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 363 (2d ed. 2006)) [hereinafter *ESKRIDGE STATUTORY INTERPRETATION*] (“When the canon is invoked, the best interpretation of the statute is jettisoned in favor of any alternative that is ‘fairly possible,’ a slippery requirement that . . . provides[s] little barrier to truly implausible attributions of statutory meaning.”); KLOPPENBERG, *supra* note 119 (finding that the avoidance canon is applied inconsistently); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 105 (1997) (arguing that the avoidance canon may result in interpretations which are different from what Congress intended, thus courts will likely “[misconstrue] the statute and [make] its construction uncorrectable”).

find that when courts invoke the avoidance reading, they often “engage in sloppy constitutional analysis, in order to avoid responsibility for a decision based on other grounds.”¹²⁴ According to Professor William Eskridge, one of the leading critics of the canon, Judge Henry Friendly, finds that the canon allows for “stealth judicial activism, which is both anti-democratic and unhealthy for the judiciary.”¹²⁵ A corollary of this criticism is that the avoidance canon is applied unpredictably.¹²⁶

Despite the criticism, the avoidance canon has obvious benefits that outweigh the criticisms. Professor Philip Frickey finds that the “canon

The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretations of the Constitution—to create a judge-made ‘penumbra’ that has much the same prohibitory effect as the judge-made . . . Constitution itself . . .

RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985); William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1066 (1989) (finding that invoking public values to avoid constitutional doubts would be “inconsistent with legislative supremacy”); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 400 (2005) (“A fundamental attack is that the avoidance canon allows a court, on the vague ground that a serious constitutional question exists, to rewrite statutes without clear limits on the revising role and without a clear demonstration that the Constitution compels rejecting the most natural interpretation of the law.”); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 835 (2001) (finding that separation of powers doctrine urges courts to abandon the avoidance canon); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224 (finding that the nondelegation doctrine’s goals are ill-served by “a technique that asserts the prerogative to alter a statute’s conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 573–75 (1990) (arguing for less constitutional avoidance in immigration law instead of enforcing constitutional norms through avoidance); John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1496–98 (1997) (arguing that the avoidance canon should be narrowed to “the unconstitutionality canon” which “requires a court to decide the constitutional question while the [avoidance] canon allows a court to avoid any such decision”); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 83 (finding the avoidance canon encourages stealth judicial activism); Vermeule, *supra* note 115, at 1946 (finding an inherent tension between the avoidance canon and severability doctrine).

124. ESKRIDGE, *STATUTORY INTERPRETATION*, *supra* note 123; *see also* *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring) (“The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute.”).

125. WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 919 (4th ed. 2007) (emphasis in original) (citing HENRY J. FRIENDLY, *BENCHMARKS* 211–12 (1967)).

126. *Id.* at 920.

may perform an invaluable normative function in public law. The canon provides a means to mediate the borderline between statutory interpretation and constitutional law, and between the judicial and legislative roles, where judicial line-drawing is especially difficult, and where under-enforced constitutional values are at stake.”¹²⁷

Professor William Eskridge finds there are three important values that the avoidance canon preserves. First, the avoidance canon helps to ascertain legislative intent. For instance, “[t]he avoidance interpreter assumes that the legislature would not have wanted to press constitutional limits,” when enacting the disparate-impact statute.¹²⁸ Second, the canon gives effect to under-enforced constitutional norms.¹²⁹ For instance, because courts “are loath to strike down immigration statutes,” they give effect to due process and free speech norms through narrow statutory constructions.¹³⁰ This practice is evident in *Ricci* because the Court gave effect to under-enforced equal protection norms even though it did not technically rule on the constitutional issue.¹³¹ Moreover, because constitutional language like “due process” and “equal protection” is vague, and that courts are required to elaborate on these doctrines which go beyond anything

127. Frickey, *supra* note 123, at 402.

128. ESKRIDGE JR. ET AL., *supra* note 125, at 918 (emphasis in original).

129. Motomura, *supra* note 123, at 563.

130. ESKRIDGE JR. ET AL., *supra* note 125, at 918 (citing Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 572–73 (1990)).

131. *Ricci* seems to give effect to these equal protection norms because the Court repeatedly used the equal protection framework while adjudicating the firefighter’s disparate-treatment claim, suggesting that “whatever distinctions there may be between disparate treatment and equal protection have little importance to either doctrine’s relationship to disparate impact law.” Primus, *supra* note 12, at 1356. First, the Court did not say whether the *Ricci* plaintiffs suffered an adverse employment action, like being fired, which is required for Title VII but not the constitution. See Tristin Green, *Title VII, the Adverse Action Requirement, and Ricci v. DeStefano*, CONCURRING OPINIONS (Feb. 5, 2009, 11:39 PM) www.concurringopinions.com/archives/2009/02/title_vii_the_a.html. Second, the Court skipped over the usual method of disparate-treatment analysis, the *McDonnell-Douglas* burden-shifting framework. Even though the district court in *Ricci* applied this framework, the Court avoided this analysis even though every Supreme Court case prior to *Ricci* used this framework when analyzing a disparate-treatment claim. Primus, *supra* note 12, at 1359; see also *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151 (D. Conn. 2006), *rev’d* 564 U.S. ___, 129 S. Ct. 2658 (2009) (employing the *McDonnell-Douglas* burden-shifting test because the plaintiffs had alleged intentional discrimination). Third, the Court said essentially that the city’s “predominant motive” for throwing the test out was because of race, which is an equal protection term. Primus, *supra* note 12, at 1360–61. Finally, the Court borrowed the strong-basis equal protection standard, which for constitutional cases provides the standard of evidence needed for a government body to institute an affirmative-action plan. *Id.* at 1361. Additionally, the Court identified no differences between the equal protection and Title VII strong-basis standards, suggesting that they are practically the same. *Id.* at 1361–62.

that can be gleaned from the text, courts should avoid debatable case-by-case elaborations when possible.¹³² This is especially true of constitutional law because Congress cannot reenact a statute that is deemed unconstitutional.¹³³ Third, the avoidance canon gives effect to the passive virtues of not unnecessarily striking down democratically enacted statutes.¹³⁴ Avoidance then, is a way for courts to preserve their institutional capital and appear legitimate in the eyes of the people.¹³⁵

Justice Breyer has recently advocated that the avoidance canon is a pragmatic method of statutory interpretation that creates a workable constitution and helps to secure continued acceptance and credibility of the federal judiciary.¹³⁶ For example, in *Zadvydas v. Davis*,¹³⁷ Breyer found the Court interpreted an unclear statute in a way that was not Congress's first choice, but it was preferable for the Court to choose the "risk of ignoring Congress's purpose over the risk of setting the statute entirely aside."¹³⁸ Breyer finds that Congress would prefer this trade off, favoring an interpretation of a statute that "ensured its continued validity to an interpretation that made it vulnerable to invalidation."¹³⁹

132. ESKRIDGE, STATUTORY INTERPRETATION, *supra* note 123, at 361; *see also* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 857 (2005) ("The principle of constitutional avoidance has a long and distinguished pedigree and is grounded in the recognition that constitutional interpretation and judicial review are delicate functions.").

133. ESKRIDGE JR. ET AL., *supra* note 125, at 918; ESKRIDGE, STATUTORY INTERPRETATION, *supra* note 123, at 361.

134. ESKRIDGE JR. ET AL., *supra* note 125; *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 122, 169, 183 (1962) (discussing the value of the avoidance canon as a passive virtue and the positive implications of the avoidance canon).

135. ESKRIDGE JR. ET AL., *supra* note 125; *but see* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 134 (1987) (arguing that the Court's legitimacy is not fragile, and conserving judicial credibility should not be a primary objective in constitutional interpretation). Indeed, the Court has pushed through political firestorms following decisions which alter the political arena, such as *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) "with its institutional credibility intact." Jonathan S. Carter, *Passive Virtues Versus Aggressive Litigants: The Prudence of Avoiding a Constitutional Decision in Snyder v. Phelps*, 89 N.C. L. REV. 326, 343–44 (2010).

136. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 105 (2010); *see also* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."); POPKIN, *supra* note 115, at 15 ("Supporters of the canon point to the pragmatic justification—forcing the legislature to revisit legislation which impinges on important values so that the legislature reaches that result only after careful attention.").

137. 533 U.S. 678 (2001).

138. BREYER, *supra* note 136, at 104.

139. *Id.*

In applying the avoidance canon to the equal protection issue raised by *Ricci*, there appears to be a “serious doubt” as to the disparate-impact statute’s constitutionality, as raised by Scalia’s concurrence in *Ricci* and Primus’ general reading of *Ricci*.¹⁴⁰ Although disparate impact does not require direct intentional discrimination, it does seem to encourage indirect discrimination.¹⁴¹ Because there is a serious doubt as to disparate impact’s constitutionality, a court needs to “ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.”¹⁴² One construction of the disparate impact statute that surely meets this standard is the strong-basis standard. This is exactly what the *Ricci* Court did, although the Court did not explicitly raise the constitutional problem and then try to find an alternative statutory interpretation to avoid the issue.¹⁴³ A “fairly possible” and reasonable interpretation that avoids the equal protection issue is to adopt the strong-basis interpretation of Title VII and continue using this standard.¹⁴⁴

Although *Ricci* implicitly avoided the constitutional issue, courts should explicitly avoid the constitutional issue in future cases if a litigant makes a wholesale challenge to disparate impact. Those arguing for avoidance should try to persuade courts to further interpret the disparate-impact statute in a way that allows the strong-basis standard to alleviate equal protection concerns.

In sum, the avoidance reading does not encourage a blanket rewriting of the disparate-impact statute. It only encourages a flexible reading of the strong-basis standard. And avoidance is the best strategy for protect-

140. This preliminary factual inquiry proved that there is a risk of constitutional adjudication, which is the step zero of a constitutional avoidance analysis. Anthony Vitarelli, Comment, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837, 837 (2010).

141. See RUTHERGLEN, *supra* note 102 (finding that disparate-impact statutes incentivize employers to enact affirmative action programs so that employers are immune to class claims of disparate impact).

142. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (emphasis added); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (laying out a series of rules the Court follows when looking at Constitutional questions of law).

143. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 194–95 (finding the avoidance canon in play in *Ricci* even though the word “avoidance” was not used in the opinion).

144. To avoid the constitutional question here, courts would only have to use this narrow “fairly possible” formulation of the avoidance canon. ESKRIDGE, STATUTORY INTERPRETATION, *supra* note 123; see *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 510–11, (1979) (Brennan, J., dissenting) (finding the narrow avoidance canon is favorable because it “acts as a brake against wholesale judicial dismemberment of congressional enactments. It confines the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention”).

ing this important piece of civil-rights legislation.¹⁴⁵ “[N]o one should underestimate the Court’s ability” to indefinitely duck the question of disparate impact’s constitutionality.¹⁴⁶ The reason that the Court should duck is that an opinion that strikes down disparate impact would likely be the twenty-first century “incarnation of *Lochner v. New York*,¹⁴⁷ in which the Court overrode democratic judgments in favor of a dubious understanding of the Constitution.”¹⁴⁸ Sometimes the most important thing the Court does, then, is “not doing.”¹⁴⁹

C. *Another Reason to Avoid: The Lewis Court Failed to Raise the Equal Protection Issue*

After writing a concurrence in *Ricci* arguing that disparate impact is unconstitutional, Scalia wrote the majority opinion in *Lewis* that, surprisingly, made it easier for plaintiff’s to bring disparate-impact claims. This raises the question: Has Justice Scalia abandoned his concerns with the constitutionality of disparate impact, or is he waiting for a better case to come before the Court? In *Lewis*, the Court surely avoided the constitutional issue. Although the constitutionality of disparate impact was not directly before the Court in *Lewis*, the constitutionality of disparate impact was surely in the justices’ minds after reading Scalia’s *Ricci* concur-

145. Moreover, there are some statutes that are so revered that they are treated as part of our Constitution. Indeed, America is a republic of statutes, the classic example being the Civil Rights Act of 1964 because of its broad constitutional reverberations and extension of equal protection norms. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 7, 14 (2010). Because of this, Professor William Eskridge Jr. argues that the Court should give the benefit of the constitutional doubt to a superstatute like the Civil Rights Act, which is “a thoughtful response to an important social problem adopted after intense public debate and congressional deliberation. When applying the open-textured provision of the Constitution [like those protecting equal protection] the Court should consider the deliberated responses of Congress . . .” *Id.* at 435; *see id.* at 467 (finding that courts should construe ambiguous statutes in favor of politically marginalized minorities). The argument is that striking down the disparate-impact is tantamount to striking down part of our Constitution. However, some scholars argue that the disparate-impact prong of Title VII does not deserve heightened constitutional deference like the disparate-treatment prong. *See Primus, supra* note 12, at, 1380 n.177.

146. John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 GREEN BAG 429, 432–33 (2009).

147. 198 U.S. 45 (1905).

148. Cass R. Sunstein, *The Supreme Court, 2007 Term—Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 247 (2008).

149. *See* ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 17 (1967) (dissecting an opinion of Justice Brandeis in a decision on the Child Labor Tax).

rence and the briefs. So was *Lewis* an act of avoidance even though the Court did not have the constitutional issue squarely before them?

Party control over the issues that reach the courts is a defining characteristic of our judicial system. Judges are discouraged from engaging in “‘issue creation’—that is, raising legal claims and arguments that the parties have overlooked or ignored—on the ground that doing so is antithetical to an adversarial legal culture that values litigant autonomy and prohibits agenda setting by judges.”¹⁵⁰ Yet issue creation by federal judges happens frequently,¹⁵¹ and the Supreme Court often adds to the questions presented as well.¹⁵² In 2009, for instance, the Court ordered re-arguments in *Citizens United v. Federal Election Commission*¹⁵³ as to whether the court should strike down a part of a campaign-finance law limiting corporate funding in elections.¹⁵⁴ The Court then overruled precedent and struck down the law.¹⁵⁵

Citizens United illustrates that the Court is willing to engage in issue creation if it wants to. The *Lewis* Court could have just as easily ordered re-argument as to whether disparate impact violates equal protection. Professor Amanda Frost argues that courts should be willing to raise issues sua sponte as a way for judges to uphold their constitutional duty to say what the law is.¹⁵⁶ Indeed, Frost argues that:

[T]he Court may need to engage in issue creation to reverse one of its own precedents. The parties will often hesitate to challenge a pre-

150. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 447 (2009).

151. For instance, landmark Supreme Court cases like *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Washington v. Davis*, 426 U.S. 229, 238 (1976), decided constitutional issues never raised by the parties.

152. Frost, *supra* note 150; *see also* *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (noting that the Court has “on occasion rephrased the question presented . . . or requested the parties to address an important question of law not raised”).

153. 558 U.S. ___, 130 S. Ct. 876 (2010).

154. *See* Robert Barnes, *Justices to Review Campaign Finance Law Constraints*, WASH. POST, June 30, 2009, at A3, available at 2009 WLNR 27045505 (calling the order to delay the decision and to schedule “a rare September hearing” a “surprise move”).

155. *Citizens United v. Fed. Election Comm’n*, 558 U.S. ___, 130 S. Ct. 876, 917 (2010).

156. *See* Frost, *supra* note 150, at 470 (defending “the occasional use of judicial issue creation as an essential tool with which the courts can protect the integrity of judicial decisionmaking and the law itself”). *But see* Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding* *Dickerson v. United States*, 149 U. PA. L. REV. 287, 292 (2000) (“[C]ourts exceed[] the appropriate judicial role in raising a major constitutional issue not presented by the parties”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) (asserting that the system works best when the decisionmaker “rests his decision wholly on the proofs and argument actually presented to him by the parties”).

cedent directly, preferring to distinguish it from their case, and thus the Court may be forced to raise the issue on its own motion.¹⁵⁷

Moreover, the prohibition on judges from acting as roving commissioners or mini-legislators “does not justify a court’s refusal to raise a constitutional question that goes to the heart of a case before it, and which the court is required to decide.”¹⁵⁸

It is seriously unlikely that a public fire department, like in *Ricci* or *Lewis*, is going to argue that the disparate-impact statute is unconstitutional. It is taboo to argue that civil-rights statutes are unconstitutional. Indeed, the only serious arguments for the proposition that disparate impact is unconstitutional have come from libertarian organizations, such as the Pacific Legal Foundation.¹⁵⁹ Since barely anyone will argue against the constitutionality of a civil-rights statute, this increases the necessity of the Court to address the constitutional issue if needed. There are no clear guidelines about when the Court will deviate from its practice of letting parties frame the legal issues.¹⁶⁰

If the Court really thought that the disparate-impact statute was plainly unconstitutional and that the issue could not be avoided, then the Court should have raised the issue in *Lewis*, just like the Court sua sponte raised the constitutional issue in *Citizens United*.¹⁶¹ Since disparate impact was read into Title VII in 1971 in the *Griggs* case, disparate impact has been assumed to be constitutional. And in 1976, *Washington v. Davis* rejected the idea that the government could be sued under the Equal Protection Clause for causing a disparate impact, but the Court opined in dicta that “Congress could create disparate-impact statutes.”¹⁶² Although there is no precedent saying disparate impact is constitutional, this has been the dominant understanding after *Davis*. Until very recently it would have been absurd to think that the application of the disparate-impact statute could ever violate equal protection.¹⁶³ As Justice

157. Frost, *supra* note 150, at 514.

158. *Id.* at 486.

159. See, e.g., Brief for Pac. Legal Found. as Amicus Curiae Supporting Respondent at 11, *Lewis v. City of Chicago*, 560 U.S. ___, 130 S. Ct. 2191 (2010) (No. 08-974) (arguing that the disparate impact provisions of Title VII will only encourage race to continue to be factor in American’s lives).

160. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 346 (7th ed. 1993); see also Frost, *supra* note 150, at 463 (addressing reasons why judges may raise issues sua sponte).

161. See *Citizens United v. Fed. Election. Comm’n*, 558 U.S. ___, 130 S. Ct. 876, 888 (2010) (noting that the Court requested that the parties file supplemental briefs on whether the Court should overrule certain cases).

162. Primus, *supra* note 12, at 1343; *Washington v. Davis*, 426 U.S. 229, 239 (1976).

163. Primus, *supra* note 12, at 1343.

Brennan stated, “[t]he more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation.”¹⁶⁴

Because the Court did not raise the equal protection issue in *Lewis*, this demonstrates the Court’s continuing practice of avoiding the constitutional question, as they should.

D. *Striking down Disparate Impact Would Cause a Showdown over Congress’s Authority Under Section Five of the Fourteenth Amendment*

The Equal Protection Clause protects against the denial of equal protection by state governments.¹⁶⁵ Section Five of the Fourteenth Amendment grants Congress the “power to enforce, by appropriate legislation” the Equal Protection Clause.¹⁶⁶ The unresolved question that the Court would have to face if they wanted to strike down disparate impact is whether the scope of Congress’s Section Five power includes the power to enact the disparate-impact prohibition.

The Section Five question is a threshold issue for deciding the constitutionality of disparate impact. According to Professor Chemerinsky,

In deciding whether a state can be sued under a federal statute, the court must decide whether the law is a valid exercise of Congress’s §5 powers. If the Court upholds the law as permissible under §5, the state may be sued, otherwise the litigation cannot go forward against the state government.¹⁶⁷

The Court needs to determine whether Congress lawfully abrogated the states’ Eleventh Amendment right of sovereign immunity against lawsuits.¹⁶⁸ Thus, before getting to the issue of whether Congress was prohibited from enacting the disparate-impact statute under equal protection because of the statute’s overt concern with race, the Court would have to answer the Section Five question.

164. *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

165. U.S. CONST. amend. XIV, § 1.

166. U.S. CONST. amend. XIV, § 5. The Fourteenth Amendment protections against violating ones equal protection rights only apply to governmental action, not to private conduct. *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883); see *United States v. Morrison*, 529 U.S. 598, 621 (2000) (“Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”).

167. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 3.7 (3d ed. 2006).

168. See *Hans v. Louisiana*, 134 U.S. 1, 9 (1890) (“[A]nd the question is presented whether a state can be sued in a circuit court of the United States by one of its own citizens upon the suggestion that the case is one that arises under the constitution or laws of the United States.”).

Based on the latest Supreme Court opinions on the Section Five issue, Congress can enact statutes under its Section Five powers if the claims Congress allows against state governments receive heightened judicial scrutiny like race.¹⁶⁹ Congress has much broader authority to legislate if the claim is a type of discrimination that receives heightened scrutiny or strict scrutiny, like racial or gender discrimination.¹⁷⁰ For instance, in *Nevada Department of Human Resources v. Hibbs*,¹⁷¹ the Court upheld a federal statute under a Section Five challenge, concluding that state employees could sue their employers for violating the family-leave provision of the Family and Medical Leave Act.¹⁷² The Court said Congress was clearly trying to prevent state gender discrimination in employment, which triggers heightened scrutiny under the Equal Protection Clause.¹⁷³

However, it is not clear whether the Court's Section Five cases authorize Congress to enact the disparate-impact statute. Clearly, Title VII's disparate treatment provision would be allowed under Congress's Section Five powers because Congress would be enforcing a remedy against intentional race discrimination, a claim that receives strict scrutiny. When a government employer intentionally discriminates, it violates the Equal Protection Clause and Congress can pass a law to stop that violation. However, it is constitutional for a government employer to allow disparate impact discrimination to persist after *Washington v. Davis*.¹⁷⁴ This indicates that the disparate-impact statute may exceed Congress's remedial power to enforce the Fourteenth Amendment, even if disparate treatment is within Congress's power. This question is officially unresolved since courts and scholars have remained divided on this issue.¹⁷⁵

169. CHEMERINSKY, *supra* note 167.

170. *Id.*

171. 538 U.S. 721 (2003).

172. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003).

173. *Id.* at 736.

174. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

175. Primus, *supra* note 100, at 495 n.4. Some courts have concluded that Congress can enact Title VII's disparate impact prohibition under Section Five, *see Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615, 626–27 (8th Cir. 2001); *In re Emp't Discrimination Litig.*, 198 F.3d 1305, 1321–24 (11th Cir. 1999). However, other courts have disagreed. *See Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (finding that Congress may not use Section Five to enact Title VII's disparate impact prohibition). Commentators also disagree on the subject. Compare Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 698 (2001) (concluding that disparate impact liability is an accommodation requirement given to Congress by Section Five), Rebecca S. Giltner, Note, *Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship*, 10 MICH. J. RACE & L. 427, 460 (2005) (asserting that the disparate impact standard is an important legal theory that is within Congress's authority), Claude Platton, Note, *Title VII Disparate Impact Suits Against State Governments After Hibbs and Lane*, 55 DUKE L.J. 641, 643 (2005) (arguing that under the logic of the Court's Section Five precedent, "Title VII's

Professor Kenji Yoshino even thinks that “Justice Scalia [in his *Ricci* concurrence] hinted that the disparate impact provisions of Title VII might not find adequate ground in Congress’s [S]ection Five power.”¹⁷⁶ This contentious debate over Congress’s Section Five power is all the more reason for courts to avoid the constitutional question of whether disparate impact is unconstitutional. Answering this question will open a Pandora’s Box of difficult legal issues.

IV. ARGUMENTS FOR KEEPING THE STRONG-BASIS STANDARD AND STICKING TO CONSTITUTIONAL AVOIDANCE READING

No legal rule perfectly solves intractable social issues like the proper boundaries of the antidiscrimination laws. The *Ricci* strong-basis standard is a better policy alternative than completely axing disparate impact.¹⁷⁷ This Note finds that the strong-basis standard is the best available way for a court to deal with situations in which the employer is facing either disparate treatment or disparate-impact liability, depending on whether the employer keeps the test. This is why the Court should adopt the constitutional avoidance reading. This reading is a minimalist one because it advocates for keeping disparate impact and the strong-basis standard, while letting the lower courts work out how to apply the standard.¹⁷⁸

disparate impact provision is an appropriate legislative response to this country’s long history of discrimination against women and racial and ethnic minorities, and it applies to government and private employers alike”), with Nicole E. Grodner, Note, *Disparate Impact Legislation and Abrogation of the States’ Sovereign Immunity After Nevada Department of Human Resources v. Hibbs and Tennessee v. Lane*, 83 TEX. L. REV. 1173, 1212–23 (2005) (asserting that it is unlikely that Congress’s Section Five authority applies to disparate impact cases under Title VII). For scholarship debating the scope of Congress’s Section Five power, see Larry D. Kramer, *The Supreme Court, 2000 Term - Foreword: We the Court*, 115 HARV. L. REV. 4, 136–53 (2001); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537 (1998); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943 (2003).

176. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 773 (2011).

177. Cf. Cass R. Sunstein, *Beyond Marbury: The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2592–93 (2006) (finding that there is “strong evidence that, for hard statutory questions within the Supreme Court, policy arguments of one or another sort often play a central role . . .”).

178. Because the law naturally moves to become more efficient, the strong-basis standard should become a more efficient legal tool as time passes. George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977).

A. Arguments for Keeping the Strong-Basis Standard

i. The Strong-Basis Standard is More Fair than a Good-Cause Standard

If a good-cause standard was enacted to overturn *Ricci*,¹⁷⁹ an employer could hypothetically throw out a valid test multiple times until they reached their preferred numerical balance.¹⁸⁰ This is why the Court in *Ricci* sided with the strong-basis standard. Even proponents of the good-cause standard concede that if an employer did throw out the test multiple times, this creates an inference of intentional discrimination.¹⁸¹ But even allowing an employer one free pass to throw out a test with just a statistical disparity or “good cause” and some evidence of problems with the test would give employers too much room to discard tests.¹⁸²

The strong-basis standard also seems to be more fair than the good-cause standard because it guards against the soft coercion of the disparate-impact doctrine. Some commentators argue that disparate impact incentivizes employers to reach a racially balanced workforce to mitigate the threat of disparate-impact liability.¹⁸³ This is called soft coercion because disparate impact does not force employers to adopt quotas per se, but if employers do reach a proportional balance there is less threat of liability. One way to guard against disparate-impact liability is for employers to adopt affirmative action plans.¹⁸⁴ However, the strong-basis standard guards against the soft coercion of disparate impact since em-

179. See *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) (implying that the strong-basis standard does not have “staying power,” and that Congress should enact a less burdensome standard); Harris & West-Faulcon, *supra* note 7 (urging Congress to overturn *Ricci* in its entirety).

180. Professor Hart argues that even a good-cause standard would not be helpful for those who disagree with *Ricci* because the central assumption of the case—that when employers seek to avoid tests that unfairly impact minority workers they are engaging in discrimination against White workers—would still be left intact after legislation. See Melissa Hart, *From Wards Cove to Ricci: Struggling Against the “Built-in Headwinds” of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 278-79 (2011).

181. Transcript of Oral Argument at 48–49, *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658 (2009) (Nos. 07–1428 & 08–328).

182. See Lynda L. Arakawa & Michele Park Sonen, Note, *Caught in the Backdraft: The Implications of Ricci v. DeStefano on Voluntary Compliance and Title VII*, 32 U. HAW. L. REV. 463, 483 (2010) for a proposal that advocates for a standard similar to good cause. See also Erica E. Hood, Note, *The Quintessential Employer’s Dilemma: Combating Title VII Litigation by Meeting the Elusive Strong Basis in Evidence Standard*, 45 VAL. U. L. REV. 111, 154–55 (2010) (advocating an amendment to Title VII that would allow “employers to implement good-faith affirmative action practices” when discarding disparate test results).

183. Heriot, *supra* note 90.

184. *Id.*

ployers can no longer throw out tests without substantial evidence of defects with the test.

In addition, the unfairness of the good-cause standard might make it constitutionally suspect.¹⁸⁵ A close reading of *Ricci* implies that the strong-basis standard is the minimum standard necessary under the Constitution.¹⁸⁶ Of course, a hard question remains as to whether there would be discriminatory intent against White firefighters if a city throws out a test because too few minorities pass.¹⁸⁷ But if Congress enacted the

185. See, e.g., Petitioners Brief on the Merits at 49, *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328) (arguing that “at a bare minimum [under the Constitution], a governmental actor must have a ‘strong basis in evidence’ that goes well beyond a prima facie case before it could ever engage in intentional racially disparate treatment based on a purported fear of disparate-impact claims”).

186. This de facto constitutional ruling in *Ricci* is similar to the de facto constitutional ruling in *Zadvydas v. Davis*, 533 U.S. 678 (2001). The *Zadvydas* Court avoided the serious constitutional question of whether indefinite detention of aliens is permissible, and read into a detention statute that aliens can only be detained for a reasonable amount of time, but not indefinitely. *Id.* at 689. *Zadvydas* and *Ricci* are similar because both cases explicitly avoided the constitutional question while implicitly deciding the constitutional question. In *Zadvydas*, the Court signaled that they would strike down a statute that authorized the indefinite detention of aliens. *Id.* Likewise, *Ricci* signaled that only a strong-basis standard satisfies equal protection, and that the Court would strike down a good-cause standard if enacted. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2691 (2009).

187. One way to test whether there was discriminatory intent is the following: “A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on [W]hites instead of [B]lack, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.” David A. Straus, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 957 (1989). Under this “reversing-the-groups” test then, a city might fail because it is not likely that they would discard the tests if Whites did poorly.

Yet, many scholars question whether the *Ricci* firefighters were actually intentionally discriminated against at all. See Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 223 (2010) (questioning whether “‘an employer’s attention to its practices’ racially disparate impact is itself evidence of its racially discriminatory intent”); see also Harris & West-Faulcon, *supra* note 7, at 118–20 (“What is striking . . . is that the *Ricci* plaintiffs projected—and later the majority of the Court accepted—the framing of the case as one in which [W]hites were racial victims, even though no minorities—indeed no one—got the jobs at issue.”).

It seems strange to view the [C]ity of New Haven as canceling the test *because* it wanted to disadvantage the [W]hite firefighters, although New Haven certainly knew that that would be the result. A better reading of the facts . . . is that New Haven acted to avoid disparate impact liability *despite* the “adverse effects upon an identifiable group” of [W]hites.

Sullivan, *supra* note 40, at 416–17 (emphasis in original); Leland Ware, *Ricci v. DeStefano*, *Smoke, Fire and Racial Resentment*, 8 RUTGERS J. L. & PUB. POL’Y 1, 20–26 (2011); Michael J. Zimmer, *Ricci’s “Color-Blind” Standard in a Race Conscious Society: A Case of Unin-*

good-cause standard, the Court seems ready to strike it down under strict scrutiny review because there is no compelling interest that could be narrowly tailored.¹⁸⁸

tended Consequences?, 2010 BYU L. REV. 1257, 1258–59 (2010) (asserting that the Court in *Ricci* empathized with the plaintiffs, which caused them to find discrimination in order to transform disparate treatment law).

However, in this so-called post-racial era, the definition of discrimination may be changing. In a recent study, scholars found that there is an emerging belief that Whites view racism as a zero-sum game, such that decreases in perceived bias against Blacks over the past six decades is associated with increases in perceived bias against Whites (a relationship not observed by Blacks). See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. PSYCHOL. SCI. 215, 215 (2011), available at <http://www.people.hbs.edu/mnorton/norton%20sommers.pdf>. Further, these scholars found that Whites now come to view anti-White bias as a bigger societal problem than anti-Black bias. *Id.* Thus, Whites now increasingly believe that they are being discriminated against. See Victoria C. Plaut, *Law and the Zero-Sum Game of Discrimination: Commentary on Norton and Sommers (2011)*, 6 PERSP. PSYCHOL. SCI. 219, 220–21 (2011) (noting that this “zero-sum finding suggests that the landmark cases that are upsetting the structure of antidiscrimination law may in fact reflect a broader sentiment in society. To the extent that this is the case, future efforts geared at antidiscrimination of historically disadvantaged racial minorities must be prepared to grapple with a fundamental shift in the presumptions of what constitutes discrimination.”).

188. See, e.g., Brief for Petitioners at 18–21, *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328) (arguing that the city did not provide adequate justification to support its race-based action).

It [the city] did not claim it was attempting to remedy past official discrimination, and its stated fear of Title VII litigation or liability based merely on unintentional numerical disparity cannot supply the requisite compelling interest, particularly when [the city] had no reason to think that the test inflicted any impermissible discrimination? [T]he remedy selected by the city cancelling the promotions across the board was not narrowly tailored to achieve any compelling interest.

Id. at 19; see also Kristina Campbell, Note, *Will “Equal” Again Mean Equal?: Understanding Ricci v. DeStefano*, 14 TEX. REV. L. & POL. 385, 410–15 (2010) (arguing that strict scrutiny should be applied to disparate impact, and that when applied, disparate impact is not narrowly tailored to stop intentional discrimination). But see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16–21 at 1520 (2d ed. 1988) (arguing that strict judicial scrutiny should be reserved for specific government acts). “Those acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group.” *Id.* See also John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (“When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking.”).

Most importantly, there is no existing compelling governmental interest for keeping disparate impact. The only existing compelling interest that could be used to justify disparate impact would be the interest of remedying past unlawful discrimination. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (addressing racial imbalance occurring in schools). But disparate impact does not require any finding of past discrimination for disparate impact to

The primary reason that the Court would likely strike down a good-cause standard is that the Court draws the line between “race-conscious measures that visibly burden specific innocent parties [visible victims, like the firefighters in *Ricci*] and race-conscious measures intended to improve the position of disadvantaged groups but whose costs are more dif-

be used, unlike public-employer affirmative action programs. Thus, there does not seem to be any existing compelling interest that could save disparate impact. Professor Eang Ngov argues that removing barriers to employment for minorities should be adopted as a compelling interest for keeping disparate impact. Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 80–88 (2010); see also Jennifer S. Hendricks, *Continuing Equal Protection: Reaching for Equality After Ricci and PICS*, 16 MICH. J. GENDER & L. 397, 451 (2010) (“The Court should explicitly recognize that both state and federal governments are empowered to strive for the elimination of structural inequalities.”). However, removing barriers to employment is not likely to be recognized as a new compelling governmental interest because it does not stand on the same normative foundation of remedying past discrimination against minorities. In other words, remedying past identified discrimination is a much more compelling reason for allowing government to racially discriminate than just removing barriers.

Additionally, some circuits have recognized a compelling interest in a diverse police department. See, e.g., *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) (explaining that a diverse police force can increase police effectiveness in protecting a city by earning the community’s trust); *Patrolmen’s Benevolent Ass’n of N.Y. v. City of New York*, 310 F.3d 43, 52 (2d Cir. 2002) (recognizing the need for law enforcement to be able to accomplish its mission in an effective manner); *Talbert v. City of Richmond*, 648 F.2d 925, 931–32 (4th Cir. 1981) (finding that “the attainment of racial diversity in the top ranks of the police department was a legitimate interest of the city”). However, unlike police departments, it seems that the racial diversity of a fire department is irrelevant to its core ability to protect the public from fires and other emergencies. Michael Selmi, *Understanding Discrimination in a “Post-Racial” World*, 32 CARDOZO L. REV. 833, 847–48 (2011) (explaining that fire fighters already have the community’s trust). Further, the compelling interest in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that racial diversity in higher education is a “compelling state interest” justifying the use of racial preferences to ensure that there is a “critical mass” of minority students) does not easily transfer over to fire fighters. See *Lomack v. City of Newark*, 463 F.3d 303, 310 (3d Cir. 2006) (holding *Grutter*’s “compelling interest in the educational benefits of diversity” is only for educational institutions, not fire departments). There is also no compelling interest to increase the amount of minority fire fighters so that they can be role models. Cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion) (finding that the role model theory may actually sanction discriminatory hiring practices).

Based on all of this, a successful compelling interest defense of disparate impact is unlikely. Primus, *supra* note 12, at 1363 (“[C]ompelling interest defenses are always longshots.”). But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (finding in an empirical study that “30 percent of all applications of strict scrutiny . . . result in the challenged law being upheld”).

fuse.”¹⁸⁹ Two examples illustrate the point that state actions that do not create visible victims are constitutional.

First, consider the Texas ten percent plan. Under this plan, the state admits to the University of Texas all Texas high school students that graduated in the top ten percent of their class.¹⁹⁰ This plan has been upheld by one circuit court even though it was designed with the motive of increasing diversity.¹⁹¹

Second, consider using race to increase diversity in secondary schools. In *Parents Involved in Community Schools*¹⁹², Justice Kennedy wrote that school district could increase diversity by race-neutral means by choosing how to draw the district lines or where to place the school even if the school could not specifically use a person’s race to achieve the same goal.¹⁹³ Because the good-cause standard would more easily create visible victims than the strong-basis standard, it is constitutionally suspect.¹⁹⁴

189. Primus, *supra* note 12, at 1369. This is also evidence of a zero-sum understanding of equality, that steps taken to benefit minorities necessarily mean that the decision maker is prejudiced against nonminorities. Norton, *supra* note 187, at 258; *see also* Patricia J. Williams, *When Prejudice Is So Malleable*, N.Y. TIMES (May 23, 2011, 12:10 PM), www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/when-prejudice-is-so-malleable (finding that “[z]ero-sum formulations of prejudice tend to emerge in lean economic times, fueling cultural or historical rivalries of all sorts”).

190. TEX. EDUC. CODE ANN. § 51.803 (West 2011).

191. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 263 (5th Cir. 2011) (applying the standard set forth in *Grutter v. Bollinger*, 539 U.S. 306 (2003)); *see supra* note 188. Racial conservatives strongly disagree with decisions like this. *See, e.g.* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 292 (2001) (“[T]here is something wrong, indeed, unconstitutional, with a legislative motive to increase the percentage of one racial group in a state university at the expense of another.”); Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-09 CATO SUP. CT. REV. 53, 73 (2009) (“Under *Ricci* and *Parents Involved*, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas’s racial motivations predominated in the institution of the plan.”). Generally though, the majority of people agree with the Texas plan, including many conservatives such as former President Bush who created the plan. *See* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 361 (2009) (pointing out that President Bush advanced the plan to “assure a diverse university population”).

192. 551 U.S. 701 (2007).

193. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment); Primus, *supra* note 12, at 1369.

194. Another way to think about this idea is to ask whether the government’s action would create racial harm, i.e., singling out individuals on the basis of their race for some type of adverse treatment. Adams, *supra* note 113, at 862. One lesson from *Ricci* is that the good-cause standard would more likely create racial harm because individuals would more likely to be singled out for adverse treatment because of their race. Thus, while government can still seek to open up access to opportunity and increase integration, it must do with without imposing racial harm. *Id.* at 837, 862–63.

Similar to the visible-victims reading is the antibalkanization principle, which also can be seen in *Parents Involved* and *Ricci*. In both of these cases, according to Professor Reva Siegal, “Justice Kennedy affirm[ed] race-conscious facially neutral laws that promote equal opportunity (such as disparate impact claims . . .) so long as the enforcement of such laws does not make race salient in ways that affront dignity and threaten divisiveness.”¹⁹⁵ Siegal also emphasizes that appearances matter here, and when racial considerations play a “visible” role when applicants are competing for promotion, this undermines the confidence of job applicants about whether they had a fair opportunity to compete.¹⁹⁶ Antibalkanization suggests then that the strong-basis standard is more appropriate. If employers follow this standard, they are less likely to use disparate impact in a way that affronts the dignity of any of the applicants or threatens racial divisiveness in the community.¹⁹⁷ Indeed, this antibalkanization principle provides race moderates reasons to uphold disparate-impact law in general, but the principle also provides reasons to limit disparate-impact law, such as by using the strong-basis standard.¹⁹⁸

ii. *Ricci* Makes Disparate Treatment Easier To Prove and Narrows Disparate Impact

Because the Court found disparate treatment so easily for the White firefighters in *Ricci*, a broader understanding of the scope of intentional discrimination may be emerging. Professor Michael Zimmer finds that *Ricci* modifies the elements of a traditional disparate-treatment claim to make it easier for all plaintiffs to prove that an employer had discriminatory intent.¹⁹⁹ Similarly, Professor Kerri Stone finds that disparate treat-

195. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1278 (2011).

196. *Id.* at 1334–35.

197. *Id.* at 1347–48.

198. *Id.* at 1365.

199. See Zimmer, *supra* note 187, 1259 (explaining that violating the “color-blind” standard often generates disparate treatment liability). In fact, disparate-treatment liability is created “if the plaintiff proves that (1) the defendant knew the racial consequences of its decision, (2) it then made that decision in light of that knowledge, thus making the decision ‘because of race,’ and (3) the plaintiff suffered the effect of an adverse employment action.” *Id.* Zimmer further indicates that “the ease with which [the *Ricci* Court] found disparate treatment may have the ironic effect of opening new avenues for civil rights advocates to more easily and therefore more successfully bring disparate treatment actions.” *Id.* at 1307.; see also Henry L. Chambers Jr., *The Wild West of Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 588 (2010) (“*Ricci* could be thought to imply that race consciousness coupled with an adverse decision often proves disparate treatment.”); Michael Subit, *A Plaintiffs’ Employment Lawyer’s Perspective on Ricci v. DeStefano*, 25 A.B.A. J. LAB. & EMP. L. 199, 199 (2010) (finding that the “majority took a very expansive view of disparate treatment” on account of race in *Ricci*). Inter-

ment is now easier to prove after *Ricci* because the Court ushered in the “transferred intent” theory of Title VII: “one who is adversely affected by a decision that is ‘race-conscious,’ or made with race in mind, may prove intentional disparate treatment under Title VII, even if her race was not considered at all or was consciously disregarded in the decision-making process.”²⁰⁰ The theory is discernable from *Ricci* because the Court found that the refusal to use the test results amounted to discrimination against all plaintiffs who wanted to use the test, including the one Hispanic plaintiff whose race did not motivate New Haven’s adverse employment decision at all.²⁰¹

These theories are welcome developments because the disparate-impact theory was a mistake to begin with since disparate impact choked off the evolution of disparate-treatment theory—“a broader definition of intent could have served the same purpose as disparate impact.”²⁰² Indeed, the *Ricci* decision improves employment-discrimination law by expanding the scope of intentional discrimination. This will help combat the growing evidence that workplace discrimination is structural and unconscious.²⁰³

The strong-basis standard also narrows the scope of disparate-impact discrimination because it appears to create a new defense for employers against a disparate-impact claim. According to Professors Joseph Seiner and Benjamin Gutman, “an employer that bases an employment decision on workplace test results would have a defense to a claim of disparate impact if it can show: (1) a strong basis in evidence that (2) it would have

estingly, if this interpretation were to be accepted, this would reduce many of the recent pleading problems under the antidiscrimination statutes. Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1645 n.158 (2011).

200. Kerri Lynn Stone, *Ricci Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 751, 753 (2009) (emphasis in original); see also Kerri Lynn Stone, *Ricci Glitch*, PRAWFSBLAWG (July 6, 2009, 6:46 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/07/ricci-glitch.html> (questioning the ease in which a disparate treatment plaintiff may be able to prove discriminatory intent following the decision in *Ricci*).

201. Stone, *supra* note 200, at 752.

202. Selmi, *supra* note 33, at 706, 782.

203. See generally Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009) (indicating that discrimination in the workplace is often unintended, invisible, and difficult to prove); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (explaining that bias is displayed subtly in workplace decision making); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Protection*, 47 STAN. L. REV. 1161 (1995) (questioning the hypothesis that discrimination in the workplace is intentional and suggesting that most “biased employment decisions” are unintentional).

been liable for disparate treatment if it had discarded the test results.”²⁰⁴ Essentially, this means disparate treatment now trumps disparate impact. This is appropriate given that intentional discrimination is a worse offense than unintentional discrimination.²⁰⁵

iii. The Strong-Basis Standard Fits into a Theory of Judicial Minimalism

The strong-basis standard is also desirable because it fits into the theory of judicial minimalism in which judges should favor narrow rulings over broad ones and “attempt to reach incompletely theorized agreements in which the most fundamental questions are left undecided.”²⁰⁶ In *Ricci*, the Court purposefully ruled on the narrow statutory question in creating the strong-basis standard; and the ruling was incompletely theorized because the fundamental question of disparate impact’s constitutionality was avoided. Similarly, in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*),²⁰⁷ the Court “embraced a manifestly implausible statutory interpretation to avoid the constitutional question” concerning the Voting Rights Act.²⁰⁸ *NAMUDNO* and *Ricci* show that the Roberts Court will attempt to avoid constitutional issues of civil rights statutes if possible.²⁰⁹ These minimalist interpretations of civil

204. Seiner & Gutman, *supra* note 85, at, 2181, 2205; see discussion *supra* Part II.C. But see *Briscoe v. City of New Haven*, No. 10-1975-cv, 2011 U.S. App. LEXIS 16834, at *21 n.13 (2d Cir. Aug. 15, 2011) (rejecting this analysis because there is no good-faith defense for disparate-impact liability).

205. Cf. Harris & West-Faulcon, *supra* note 7, at 111 (“*Ricci* resolves this conflict by installing hierarchy that favors disparate treatment over disparate impact claims.”).

206. SUNSTEIN, *supra* note 122, at 28–29 (emphasis omitted).

207. 557 U.S. ___, 129 S. Ct. 2504 (2009).

208. Hansen, *supra* note 143, at 182; see *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. ___, 129 S. Ct. 2504, 2506 (2009) (avoiding the question of whether Section Five of the Voting Rights Act is unconstitutional by creating a new definition of political subdivision).

209. Many argue that *Citizens United v. Federal Election Comm’n*, 558 U.S. ___, 130 S. Ct. 876 (2010) (striking down a provision in a campaign finance law limiting corporate funding of political broadcasts as violating the First Amendment) shows that the Roberts Court is not minimalist because in the case they skipped past a statutory solution, overruled precedent, and ruled on the constitutional issue. See, e.g., Editorial, *The Court’s Blow to Democracy*, N.Y. Times, Jan. 22, 2010, at A30 (adducing that the Supreme Court overreached and used a case that involved a narrow issue to expand upon *Citizens United* and strike down the campaign finance law provision). But the story is more complicated. The central issue in *Citizens United* was whether a statutory solution existed so that the Court could avoid the constitutional issue. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 896 (2010). The majority rejected the proposed statutory solution whereas the dissent did not. *Id.* at ___, 130 S. Ct. at 889, 937 (Stevens, J., dissenting). The majority spent many pages explaining why they could not avoid the constitutional issue. *Id.* at ___, 130 S. Ct. at 888-96. And Roberts specifically distinguished the avoidance done in *NAMUDNO*, and why he

rights statutes are beneficial because it shows deference to Congress and judicial restraint for such important legislation.

iv. The Strong-Basis Standard Fits Under the Standard Constitutional Borrowing Framework

One irony of the strong-basis standard is that the Court avoided the equal protection issue by borrowing the strong-basis standard from equal protection jurisprudence. Yet this sort of borrowing is ubiquitous in constitutional law. Constitutional borrowing is the process of a court drawing from one domain of constitutional law in order to interpret or bolster another domain.²¹⁰ Analyzing the strong-basis standard through the constitutional borrowing framework shows that the strong-basis standard could be a lasting solution to the conflict between equal protection and Title VII. The most common method of borrowing is called transplantation, which is what the Court did in *Ricci*.²¹¹

Professors Nelson Tebbe and Robert Tsai encourage analysis of the transplantation version of constitutional borrowing through the criteria of fit and completeness.²¹² There are four factors for evaluating how well different bodies of constitutional law fit together: (1) synergy and novelty, (2) persuasiveness, (3) practical yield, and (4) whether background conditions affect the combination of ideas.²¹³ Based on these factors, it appears there is a tight fit between the constitutional and the statutory

felt compelled to decide the constitutional issues in *Citizens United*. *Id.* 558 U.S. at ___, 130 S. Ct. at 918 (Roberts, C.J., concurring); Hasen, *supra* note 143. By contrast, the dissent thought that a plausible statutory solution mandated the Court to avoid the constitutional issue finding that “[e]ach of the [avoidance] arguments . . . is surely at least as strong as the statutory argument the Court accepted in last year’s Voting Rights Act case [*NAMUDNO*].” *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 938 n.16 (Stevens, J., dissenting). This indicates that the Court is headed in a modest conservative direction. Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1, *available at* 2010 WLNR 14791293. However, the Court is still committed to avoiding constitutional issues and minimalism if they believe there is a valid basis for deciding the claim. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 918 (Roberts, C.J., concurring).

210. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010).

211. *Id.* at 472 (defining transplantation as the importing of “legal ideas, in whole or piecemeal, from one context to another”). In deciding to borrow from equal protection, Justice Kennedy noted that the tension between disparate impact and disparate treatment is similar to the tension in constitutional affirmative action cases between the principle that there should be no governmental discrimination and a government’s need to use race-conscious measures to remedy past discrimination. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2675 (2009).

212. Tebbe & Tsai, *supra* note 210, at 472 n.30, 495 (“Questions of fit arise with greatest urgency when one engages in an original act of transplantation. . . .”).

213. *Id.*

strong-basis standards. First, there is synergy between the standards because they are both allowing a race-conscious remedy to benefit minorities when there is strong evidence of either past or disparate-impact discrimination. Moreover, discrimination in the Title VII and equal protection contexts are nearly coextensive. Second, there are persuasive reasons for appropriating the strong-basis standard; the same interests are at work in both the equal protection and Title VII settings. Public opinion also supports the *Ricci* plaintiffs.²¹⁴ Third, the practical yield of the borrowing creates a way to solve the conflict between the two strands of Title VII. Fourth, there does not appear to be any background conditions that would hinder the success of the borrowing.

In addition, problems of completeness are not prevalent with the strong-basis standard. The standard is not borrowing from one different understanding of equality to another, such as when gay marriage proponents compare the denial of marriage based on sexual orientation to the denial of marriage based on race.²¹⁵ That the Court only partially borrowed the equal protection strong-basis standard is a better option than wholesale borrowing because this “preserves maneuverability in current and future deliberations.”²¹⁶ Because the Title VII strong-basis standard is incomplete, lower courts have more discretion to develop the standard to resolve new conflicts.

B. *Arguments Against the Strong-Basis Standard*

i. Lack of Guidance for Lower Courts

One of the strongest criticisms of the standard is that it provides no guidance for the lower courts.²¹⁷ The Court explained that a *prima facie* case of disparate impact—a sheer numerical disparity between Whites

214. See QUINNIPIAC UNIV. POLLING INST., U.S. VOTERS DISAGREE 3–1 WITH SOTOMAYOR ON KEY CASE, QUINNIPIAC UNIV. NATIONAL POLL FINDS; MOST SAY ABOLISH AFFIRMATIVE ACTION (2009), available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1307> (reporting that seventy percent of Americans believed that the City of New Haven should be required to use the results of a promotion test even if that result was that no Black firefighters were promoted); Emily Swanson, *US: National Survey* (CNN 6/26-28), POLLSTER (June 29, 2009, 5:09 PM) http://www.pollster.com/blogs/us_national_survey_cnn_62628.php?nr=1 (reporting that sixty-five percent of the public think that the White firefighters were victims of discrimination and should get the promotions based on the test results).

215. Tebbe & Tsai, *supra* note 210, at 506. This is a more complicated type of borrowing. *Id.* (finding this type of borrowing has been resisted by the African-American community).

216. *Id.* at 505.

217. Kathy DeAngelo, Note, *Title VII's Conflicting "Twin Pillars" in Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), 33 HARV. J.L. & PUB. POL'Y 361, 371 (2009).

and minorities—does not satisfy the strong-basis standard.²¹⁸ For liability, there has to be a prima facie case and strong evidence that the test is not job related, or a less-discriminatory alternative test that the employer refuses to accept. Satisfying the strong-basis standard requires less evidence than the amount needed for an employer to prove a disparate-impact case against itself. Indeed, the most guidance on the standard comes from the *Ricci* facts themselves: the amount of evidence the city had in *Ricci* of lack of job relatedness for the test does not satisfy the standard. Besides that, courts are left to their own intuition.

Yet, judges usually are quite skilled at applying ambiguous standards, so the dire predictions of havoc from an ambiguous standard are unwarranted. Courts will figure out what amount of evidence is considered “strong” through the common-law process of applying factors to weigh various types of evidence.²¹⁹

Professor Kenneth Marcus argues that the strong-basis standard is ineffective because it is likely that the standard was incorrectly applied in the first place.²²⁰ Marcus finds that “a strong case can be made that the city would have been liable under existing disparate-impact law to the extent that it had failed adequately to consider alternative procedures that would have generated less racially disparate results.”²²¹ However, there was no evidence the city was actually presented with a less discriminatory alternative test.

The first application of the Title VII strong-basis standard surfaced in a follow-up case to *Ricci* called *Briscoe v. City of New Haven*.²²² In this case, Michael Briscoe—the Black firefighter who scored the highest on the oral portion of the test in *Ricci*, but was ineligible for promotion because his written score was low—filed a disparate-impact suit against the

218. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2678 (2009).

219. Marcus, *supra* note 191, at 76 (listing factors that may be used to assess whether an employer has a strong basis, including: “the credibility of witnesses, the availability of evidence, the sympathetic qualities of the likely plaintiffs, or its own unsympathetic qualities”). One court has already started this process of deciphering what constitutes a strong basis in evidence. See *United States v. Brennan*, No. 08-5171-cv, 2011 U.S. App. LEXIS 9455, at *133 (2d Cir. May 5, 2011) (“[A] strong basis in evidence of disparate-impact liability is an objectively reasonable basis to fear such liability. It is evaluated at the time an employer takes a race-conscious action. It relies on real evidence, not just subjective fear or speculation.”). The court in *Brennan* extended *Ricci* and held “that the strong-basis-in-evidence standard of *Ricci* applies not only to the question of disparate-impact liability, but also to the further question of whether the employer’s race- or gender-conscious action is necessary to remedy that disparate impact.” See *id.* at *136–37.

220. *Id.*

221. *Id.* at 77.

222. No. 3:09-cv-1642, 2010 WL 2794231 (D. Conn. July 12, 2010).

city.²²³ He claims that he would have been promoted if the test weighting formula had been modified to give more weight to the oral component of the test, instead of the 60-percent-writing/40-percent-oral formula that the city used.²²⁴ The *Ricci* Court anticipated a lawsuit like this, which is why the court inserted this passage at the end of the opinion:

Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit [like from Briscoe], then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.²²⁵

Based on this passage that seemingly created a strong-basis-standard defense to disparate-impact suits, the district court held that *Ricci* “squarely foreclosed” Briscoe’s claims and dismissed his suit because there was no evidence of less discriminatory alternatives (like a different test weighting formula) that served the city’s needs.²²⁶ The district court appeared to correctly apply this strong-basis standard defense to disparate-impact suits by dismissing Briscoe’s disparate-impact suit.²²⁷

However, the Second Circuit reversed and held that *Ricci* did not foreclose Briscoe’s claim of disparate-impact discrimination.²²⁸ The court read the passage just quoted from *Ricci* as having “no actual logical relationship to the holding”²²⁹ in which the City of New Haven was ordered by the *Ricci* Court to reinstate the test results. The Second Circuit found that a ruling for the city would affect a substantial change in Title VII disparate-impact litigation because it would create an affirmative defense to disparate-impact claims, and that it was unreasonable to believe that the Supreme Court intended to create this defense with a “single sentence of dicta” targeted only at the parties affected by the test in *Ricci*.²³⁰ But given that the *Ricci* Court expressly stated that it was resolving the

223. *Briscoe v. City of New Haven*, No. 3:09-cv-1642, 2010 WL 2794231, at *1–*3 (D. Conn. July 12, 2010).

224. *Id.*

225. *Ricci v. Destefano*, 564 U.S. ___, 129 S. Ct. 2658, 2681 (2009).

226. *Briscoe*, No. 3:09-cv-1642, at *6.

227. *Id.*

228. *Briscoe v. City of New Haven*, No. 10-1975-cv, 2011 U.S. App. LEXIS 16834, at *2 (2d Cir. Aug. 15, 2011).

229. *Id.* at *15.

230. *Id.* at *23.

competing expectations under *both* the disparate-treatment and disparate-impact provisions,²³¹ this interpretation may be further challenged.

Overall, the strong-basis standard, although imperfect, is workable. The disparate-treatment prong of the strong-basis standard, like that used in *Ricci* itself, seems to be effective since lower courts are working out how to apply it.²³² Nevertheless, the Second Circuit in *Briscoe* did show that the disparate-impact prong of the strong-basis standard can be interpreted multiple ways, which may eventually necessitate further review by the Supreme Court.²³³

ii. The Strong-Basis Standard Will Hinder Employers' Efforts to Diversify Their Workforces

Professors Cheryl Harris and Kimberly West-Faulcon contend that “*Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into White racial injury.”²³⁴ These professors are correct in that an employer’s previous efforts to rectify inequality—by discarding tests because of mere statistical imbalances—are no longer allowed. This means that employers that do not care about increasing diversity will have little incentive to discard valid tests to remedy disparate impacts. Since disparate treatment carries much higher damages than disparate impact,²³⁵ a rational employer might just wait to be sued for disparate impact before taking steps to remedy unequal results for fear of dispa-

231. *Ricci v. Destefano*, 564 U.S. ___, 129 S. Ct. 2658, 2681 (2009).

232. *United States v. Brennan*, No. 08-5171-cv, 2011 U.S. App. LEXIS 9455 (2d Cir. May 5, 2011).

233. The reason this ruling seems paradoxical is because the *Ricci* Court ordered the city to use the test. But the Second Circuit interpreted *Ricci* to allow employees who did not pass the test to sue the city for using this very same test even though the city was forced against their will to use the test (and eventually pay a substantial settlement to the *Ricci* plaintiffs). In arguing that *Ricci* left no room for *Briscoe*’s lawsuit, Victor A. Bolden, corporation counsel for the City of New Haven, stated:

‘An examination is either valid or invalid, Either it is a legitimate tool for promotion to a position or it is not a legitimate tool to determine who should be promoted. It, however, cannot be both. The Supreme Court ordered the city to promote consistent with the examination’s results. These court-sanctioned promotions are lawful and the exam results used in making them must be considered legitimate as well.’

NY Court Reinstates Lawsuit by Black Conn. Fireman, Wall St. J., Aug. 15, 2011, online.wsj.com/article/APdbb6a223c5a441c78ee3701eec83ffdd.html.

234. Harris & West-Faulcon, *supra* note 7, at 81.

235. 42 U.S.C. § 1981a(a)(1) (2006) (establishing that compensatory and punitive damages can be granted “against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)”).

rate-treatment suits by White employees.²³⁶ However, employers can purposely design tests and other practices with the intent of helping minorities succeed. Accordingly, *Ricci* may make it harder to increase diversity by old means, but employers still have plenty of options to increase diversity.²³⁷

236. Similarly, fearing liability from the strong-basis standard, municipalities may “require even higher percentage disparities or relative pass rate differences before making a voluntary prophylactic change [to an employment practice], if they attempt to do so at all.” Scot Rives, Comment, *Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1322 (2011).

237. One of the traditional means of increasing diversity is for a private employer to create a voluntary affirmative action plan under Title VII. The standards for applying these private affirmative action plans were laid out decades ago in *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transp. Agency*, 480 U.S. 616 (1987). Under these cases, the standard for private affirmative action plans was much less rigid than for public affirmative action plans, which must comply with strict scrutiny. However, one scholar finds that the *Ricci* Court likely “wrote the majority opinion in such a way as to erode *Weber* and *Johnson* by stealth to make it easier to later expressly limit the circumstances under which Title VII permits voluntary [private] affirmative action plans.” Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action After Ricci*, 31 BERKELEY J. EMP. & LAB. L. 285, 330 (2010); Juan Williams, *Affirmative Action’s Untimely Obituary*, WASH. POST, July 26, 2009, at B1 (arguing that *Ricci* blows apart the past Title VII framework for voluntary affirmative action plans); see also George Rutherglen, *Ricci v. DeStefano: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 113 n.62 (2009) (noting that *Weber* was “conspicuously not cited in any of the opinions in *Ricci*.”). Similarly, Professor Corrada finds that the *Ricci* decision “strongly suggests the introduction of a new legal standard for Title VII affirmative action, forged in the context of the already-existing standard for affirmative action under the Equal Protection Clause of the U.S. Constitution.” Roberto L. Corrada, *Ricci’s Dicta: Signaling A New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 258 (2011). The new standard for private Title VII affirmative action plans then would be the strong-basis standard. See Roger Clegg, *Dousing the Fires of Racial Discrimination*, JOHN WILLIAM POPE CENTER FOR HIGHER EDUCATION POLICY (July 28, 2009), www.popecenter.org/clarion_call/article.html?id=2209 (arguing for the use of the strong-basis standard for all affirmative action plans). Thus, if this analysis is correct, voluntary affirmative action plans under Title VII would still be permissible after *Ricci*, but private affirmative action would be more circumscribed than under *Weber* and *Johnson*.

If anything is clear, the scope of what is considered to be a valid Title VII affirmative action plan has not expanded because of *Ricci*. For instance, one court held that the “manifest imbalance” and “no unnecessary trammeling” analysis under *Weber* and *Johnson* only extends to the narrow situation where an employer has undertaken a forward-looking affirmative action plan designed to benefit *all* members of a racial or gender group. See *United States v. Brennan*, No. 08-5171-cv, 2011 U.S. App. LEXIS 9455, at *7 (2d Cir. May 5, 2011) (finding that when an employer “provides individualized race- or gender-conscious benefits as a remedy for previous disparate impact, the employer must satisfy the requirements of *Ricci*, not *Johnson* and *Weber*, in order to avoid disparate-treatment liability”).

As the majority opinion explained, a lower standard for discarding tests would create a “de facto quota system.”²³⁸ Vocal critics of disparate impact will further contend that disparate impact, even with a strong-basis standard, creates an incentive for employers to reach quotas, and will argue that disparate impact should be abolished altogether. However, the strong-basis standard creates less incentive for employers to create quotas because employers must have substantial evidence that the test is not job-related. Without this evidence, the employer cannot throw out a test solely based on statistical disparity. This means that an employer cannot create de facto quotas. Indeed, the strong-basis standard actually incentivizes employers to design a test that will not have an adverse impact because employers now know that they have more hurdles to jump through if they want to discard a test.²³⁹ Given the importance of having a job for a person’s self-identity,²⁴⁰ and the role that integrated workplaces play in our diverse democratic society,²⁴¹ employers should design tests that do not unfairly exclude minority groups.

iii. An Employer’s Incorrect Focus on Liability-Avoidance

Professor Marcus argues that the strong-basis standard makes employers more concerned about being held liable for the ex post disparate impact of the tests than the ex ante belief that the tests were actually discriminatory.²⁴² The best response to this argument is that Title VII has always promoted voluntary compliance as a liability avoidance measure. Further, it is unproblematic if an employer takes into account the credibility of the witnesses and the availability of the evidence in assessing whether there is strong evidence to throw out a test. Taking account of this evidence does not automatically mean that the employer is unconcerned with discriminating against Whites; the employer is merely searching for evidence of a defective test. If this evidence exists, and the employer throws the test out based on the evidence, this should not be a Title VII violation.

238. *Ricci v. DeStefano*, 564 U.S. ___, 129 S. Ct. 2658, 2675(2009).

239. Darrell VanDeusen, *VanDeusen on Ricci v. DeStefano and its Aftermath*, 2009 EMERGING ISSUES 4031, at 10 (advising employers to “vet tests completely and thoroughly before administering it, and after administering, vet the test completely before making any decision with respect to the results”).

240. See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1881, 1886–92 (2000) (finding that a job can transform a person’s identity, build her community, and provide the basis for her equal citizenship).

241. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 4 (2003) (finding that the workplace is, “generally speaking, . . . more integrated than most places where adults spend time,” which makes the workplace “extraordinarily important in a diverse democratic society”).

242. Marcus, *supra* note 191, at 75.

Hence, the strong-basis standard may not be in conceptual tension with the Constitution's ban on discriminatory treatment. If an employer has substantial evidence that a test is not job-related, this should be a nondiscriminatory and constitutional reason to discard the test. As *Ricci* makes clear, an employer cannot discard a test solely because they think too many Whites passed. But when an employer has actual evidence of a bad test, and if the employer is genuinely discarding the test based on this evidence, then the employer is unlikely to harbor a discriminatory intent towards Whites. The strong-basis standard's requirement that the employer have evidence of a bad test actually decreases the chance that an employer will act with unconstitutional discriminatory intent in complying with disparate impact.

iv. Likely Impermanence of the Standard

If a conservative Court strikes down disparate impact or substantially narrows it, the strong-basis standard would be eliminated. Conversely, a more liberal Court could strike the strong-basis standard down and institute a more lenient good-faith standard. Thus, according to Professor Marcus, "*Ricci*'s strong-basis standard would no better survive the ruling of a sympathetic Court than it would an unsympathetic one."²⁴³

However, the chances of the Court completely striking down disparate impact are minimal, and liberal courts still must follow conservative precedent. Recall that the majority in *Ricci* could have said that Title VII does not answer the statutory issue (which, arguably, it does not), skipped right to the constitutional question, and struck down the disparate-impact statute. But they did not. Instead they applied the strong-basis standard, as a moderate solution. Moreover, because the strong-basis equal protection standard is a long-lasting constitutional precedent, and the strong-basis Title VII standard is based on the constitutional strong-basis standard, their fates are tied together.²⁴⁴

V. CONCLUSION

As a practical matter, a holding that the disparate-impact statute violates the Constitution would call into question a number of other federal laws that have disparate-impact standards.²⁴⁵ For instance, the disparate-

243. *Id.* at 78.

244. See, e.g., *United States v. City of New York*, 683 F. Supp. 2d 225, 257 (E.D.N.Y. 2010) ("The analytical framework of a workplace equal protection claim parallels that of a discrimination claim under Title VII. . . .").

245. Primus, *supra* note 100, at 496 n.15. See generally Barry Goldstein & Patrick O. Patterson, *Ricci v. DeStefano: Does It Herald an "Evil Day," or Does It Lack "Staying*

impact standards of the Americans with Disabilities Act,²⁴⁶ Age Discrimination in Employment Act,²⁴⁷ the Voting Rights Act,²⁴⁸ the Fair Housing Act,²⁴⁹ and analogous state laws²⁵⁰ would all be put into jeopardy. This strongly suggests that courts should not strike down the Title VII disparate-impact statute because that logic would release a flood of litigation challenging these other important statutes.

To be sure, disparate impact is a narrower doctrine now than it was before *Ricci*. But the strong-basis standard that *Ricci* created is a positive development, ensuring that employers have strong evidence that the test is not job-related before the test can be discarded. This standard helps guarantee that employers are not going to racially balance their workforces by discarding tests when the numbers do not come out right. Further, the strong-basis standard is the best standard for mediating the dispute between disparate impact and disparate treatment.

Ricci also does not provide a cause to worry that the disparate-impact theory has been completely weakened. Some commentators predicted that the case would bring about a doomsday situation, especially if *Ricci* stood for the principle that preventing disadvantage to White firefighters is more important than addressing barriers to promotion for racial minor-

Power?", 40 U. MEM. L. REV. 705, 786–94 (2010) (discussing the laws that would be impacted).

246. See 42 U.S.C. § 12112(b)(1), (b)(3)(A) (2006) (providing for claim for an unjustified disparate impact on disabled persons); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (“Both disparate treatment and disparate impact claims are cognizable under the ADA.”).

247. See 29 U.S.C. § 623(a)(1) (2006) (forbidding adverse employment actions “because of such individual’s age”); see also *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 94 (2008) (finding that the Age Discrimination in Employment Act provides for disparate impact claims based on age); *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005) (finding that the Age Discrimination and Employment Act allows recovery for disparate impact cases).

248. See 42 U.S.C. § 1973(a)–(b) (2006) (prohibiting discrimination at the polls); see also *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (emphasizing that all that is needed to establish a disparate impact violation is proof of discriminatory results); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (“To establish a [disparate-impact] violation, plaintiffs need only demonstrate ‘a causal connection between the challenged voting practice and [a] prohibited discriminatory result.’”).

249. See 42 U.S.C. § 3604(a) (2006) (prohibiting discrimination in the rental or sale of housing). The Fair Housing Act has been interpreted to allow disparate-impact claims where an unjustified policy disproportionately affects a person based on a protected class concerning housing. See, e.g., *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007) (listing three factors to consider when assessing a disparate-impact claim).

250. Barry Goldstein & Patrick O. Patterson, *Ricci v. DeStefano: Does It Herald an “Evil Day,” or Does It Lack “Staying Power”?*, 40 U. MEM. L. REV. 705, 792–93 (2010).

ities.²⁵¹ However, the *Ricci* decision has had a surprisingly limited impact so far in the lower courts.²⁵²

Accordingly, courts should explicitly avoid the constitutional question of the equal protection doctrine conflicting with disparate impact.²⁵³ No constitutional battle over disparate impact should ever be waged. Instead, courts should further refine the strong-basis standard as a way to avoid the constitutional issue.²⁵⁴ To do its part, Congress should update disparate impact in light of *Ricci* (by clarifying the strong-basis standard) and *Lewis* (by clarifying Title VII's statute of limitations requirements),²⁵⁵ or take the bold leap and completely overhaul Title VII.²⁵⁶

251. See Victoria C. Plaut, *A Broader Societal Shift*, N.Y. TIMES (May 23, 2011, 12:11 PM), www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/a-broader-societal-shift.

252. Bernard J. Pazanowski, *Impact of Ricci Decision Seems Limited so far*, *Employment Law Attorneys Opine*, 221 DAILY LAB. REP. C-1 (2010) (finding that *Ricci* has had a relatively little impact since it was handed down; it is limited to its facts, and it has not opened up the floodgates of litigation); see also Nancy L. Zisk, *Failing the Test: How Ricci v. DeStefano Failed to Clarify Disparate Impact and Disparate Treatment Law*, 34 HAMLINE L. REV. 27, 50 (2011) (finding that lower courts have been reluctant to adopt the *Ricci* rule).

Additionally, some commentators are arguing that the strong-basis standard should be limited to the unique facts of the case because the firefighters had a justified expectation of being promoted from the test. Goldstein & Patterson, *supra* note 250, at 786-94 (asserting that the standard should be interpreted narrowly, because of the impact it may have on other laws). But see Sullivan, *supra* note 187, at 206 (“[T]he majority seems to have been seeking a broader rule applicable to all disparate impact scenarios.”). Plaintiffs and defense lawyers also disagree about the impact of *Ricci*. Compare Subit, *supra* note 199, at 211 (acknowledging that although the majority took “an expansive view of disparate treatment, the practical result of the decision will be greater racial inequality of employment opportunity, not less”), with Barbara Jean D’Acquila, *A Management Employment Lawyer’s Perspective on Ricci v. DeStefano*, 25 A.B.A. J. LAB & EMP. L. 213, 225 (2010) (highlighting the challenge facing employers because the case adds “new and significant complexity and uncertainty to discrimination laws”). This debate probably will not make too much of a difference because few plaintiffs ever win disparate-impact suits, except well-funded litigants such as the U.S. Department of Justice. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257 (2011).

253. One court has already explicitly avoided the constitutional issue. See *United States v. Brennan*, No. 08-5171-cv, 2011 U.S. App. LEXIS 9455, at *119-122 (2d Cir. May 5, 2011).

254. Indeed, there never will be complete peace between disparate impact and disparate treatment/equal protection claims because employers inevitably must act on the basis of race. See Stanley Fish, *Because of Race: Ricci v. DeStefano*, N.Y. TIMES (July 13, 2009, 10:00 PM), <http://opinionator.blogs.nytimes.com/2009/07/13/because-of-race-ricci-v-destefano/>.

255. *The Supreme Court, 2009 Term, Leading Cases, Federal Statutes and Regulations*, 124 HARV. L. REV. 340, 349-50 (2010).

256. One familiar criticism about having two separate causes of action for disparate treatment and disparate impact is that they are extremely confusing, and hard for courts

What is clear about disparate impact after *Ricci* and *Lewis* is that the theory still plays a vital role in forcing employers to create fair employment tests for all applicants.²⁵⁷ What is equally clear is that disparate impact should never be used as an excuse for zero-sum racial politics.²⁵⁸

and practitioners to navigate. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 96 (2006). As a solution to this problem, Professor Joseph Seiner has recommended that Congress or the courts should collapse disparate impact and disparate treatment claims together so that all employment discrimination claims are brought under the same cause of action. *Id.* at 130. Instead of two different causes of action, the plaintiff could show that an employment practice "is adversely affecting him individually or as part of a larger group based on a protected characteristic." *Id.* The principle benefit of this approach is that it reduces confusion and makes employment-discrimination litigation more efficient. *Id.* at 127. Canada has adopted this approach after facing similar problems with two separate theories. *Id.*

Further, combining the analysis of disparate treatment and impact would focus discrimination claims on intent. *Id.* at 127. This standard would satisfy critics of disparate impact who find that the theory was a mistake to begin with since the development of the disparate-impact theory choked off the evolution of disparate-treatment theory. Selmi, *supra* note 33, at 782. Professor Michael Selmi explains:

The creation of the disparate impact theory also has contributed to a stiflingly limited view of intentional discrimination By itself, a broader judicial definition of intent would not have led to less inequality, but it may have opened our eyes to the persistence of discrimination in a way that the disparate impact theory could not.

Id. More importantly, a focus on intent would appease Justice Scalia and others who find the central problem with disparate impact is that it allows unintentional discrimination without a good-faith defense.

257. See Carle, *supra* note 252, at 300 (characterizing disparate impact as "America's flagship social movement for racial justice" and arguing that disparate impact should be saved); cf. Charles M. Blow, *Let's Rescue the Race Debate*, N.Y. TIMES, Nov. 20, 2010, at A19, available at 2010 WLNR 23157274 (arguing that the African-American community is doing better than in years past but they still need remedial policies like disparate impact).

258. See Rutherglen, *supra* note 237, at 85 (arguing that *Ricci* stands for the principle of "hostility to zero-sum racial politics—justifying affirmative action for some groups at the expense of others without any showing of collective benefit to the community as a whole").

